

HIDDEN HEROES: EMPLOYMENT LAW PROTECTIONS FOR MILITARY CAREGIVERS

*Bradford J. Kelley and Lance Casimir**

ABSTRACT

After decades of conflict overseas, military service members are returning home as survivors of tragic injuries from war due to incredible advances in battlefield medicine and combat casualty care. Meanwhile, veterans from past wars and conflicts are also experiencing service-related health issues along with the natural effects of aging. Regardless of whether they served in the Vietnam War or the Iraq War, many veterans increasingly need long-term medical care and support. Oftentimes, family members nobly and selflessly take on these caregiving responsibilities. There are millions of these “hidden heroes” across the country, including the spouses, parents, and other family members who care for the nation’s wounded, ill, or injured veterans. One of the foremost challenges that these family members face is balancing caregiving responsibilities at home with professional work outside the home. Likewise, employers face challenges when accommodating employees who are family military caregivers.

This Article examines the critical employment law protections for family military caregivers. First, this Article explores the modern challenges that these caregivers face and the associated public policy concerns, including military recruitment and retention concerns. Next, this Article examines the specific employment law protections available for military family caregivers. The Article then shifts to

* Bradford J. Kelley is Chief Counsel to U.S. Equal Employment Opportunity Commission (EEOC) Commissioner Keith E. Sonderling. Prior to joining the EEOC, he was a Senior Policy Advisor with the U.S. Department of Labor’s Wage and Hour Division. He is also a former U.S. Army infantry and intelligence officer and a veteran of the Iraq War. Lance Casimir is an Attorney Advisor to Commissioner Sonderling. The views and opinions set forth herein are the personal views or opinions of the authors and do not necessarily reflect views or opinions of the EEOC or any Commissioner.

examine best practices for employers so they can recruit and retain military caregiver employees. Finally, this Article argues that current protections are woefully inadequate and outlines and advances several solutions to help ameliorate the status quo, including legislative and regulatory measures.

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INTRODUCTION

After the September 11, 2001 terrorist attacks and resulting conflicts in Iraq and Afghanistan, the nation has relied on its military to an extraordinary level to support overseas operations.¹ As the number and duration of combat deployments have increased, veteran employees and their employers have been significantly impacted.² This is especially noteworthy in light of the extraordinarily high rate of disabilities among post-9/11 veterans.³ Recent studies show that “[m]ore than a third . . . of the nearly 3.8 million men and women who have served in the U.S. [military] since September 2001 and are veterans, have a service-connected disability.”⁴ Simultaneously, veterans from previous wars and conflicts are experiencing service-related health issues along with the natural effects of aging.⁵ Consequentially, many veterans are increasingly in need of long-term care and continued support.⁶

1. Bradford J. Kelley, *All Quiet on the Employment Front: Mandatory Arbitration Under the USERRA*, 34 HOFSTRA LAB. & EMP. L.J. 367, 367 (2017).

2. *Id.* at 367; see also Keith E. Sonderling, *Facing Down Job Discrimination Against Vets*, ATLANTA JOURNAL-CONSTITUTION (July 24, 2021), <https://www.ajc.com/opinion/opinion-facing-down-job-discrimination-against-vets/HKW2XLNIHRHFTC6EMSFBN2NI/>.

3. See Jonathan Vespa, *Post-9/11 Veterans More Likely to Have a Service-Connected Disability*, U.S. CENSUS BUREAU (June 2, 2020), <https://www.census.gov/library/stories/2020/06/who-are-the-nations-veterans.html> (explaining that post-9/11 veterans have experienced “the highest disability rates from their service in the armed forces . . . even after accounting for differences in age, health, sex and economic resources.”).

4. *Id.*

5. See *id.*

6. RAJEEV RAMCHAND, TERRI TANIELIAN, MICHAEL P. FISHER, CHRISTINE ANNE VAUGHAN, THOMAS E. TRAIL, CAROLINE BATKA, PHOENIX VOORHIES, MICHAEL W. ROBBINS, ERIC ROBINSON & BONNIE GHOSH-DASTIDAR, RAND CORP., *MILITARY CAREGIVERS: WHO ARE THEY? AND WHO IS SUPPORTING THEM?* 1–2 (2014), https://www.rand.org/content/dam/rand/pubs/research_

These responsibilities continually, and often unavoidably, fall on the shoulders of family members, who nobly and selflessly prioritize the needs of their loved ones on a daily basis.⁷ For example, Vanessa Brooks, Lawrence Brooks's daughter and primary caregiver, was responsible for her father's critical healthcare needs, especially as his health declined, before he passed away in 2022 as the nation's oldest living World War II veteran.⁸ Vanessa is just one of the approximately 5.5 million people—mostly family members—who provide unpaid care for active-duty military service members and veterans.⁹ More than two million children live with and provide care to a parent who is a disabled veteran.¹⁰ Military caregivers are “one of the fastest-growing segments of the [overall] caregiver demographic.”¹¹

Family caregivers of military service members must balance several unique responsibilities and challenges in addition to caregiving. These challenges may have an adverse effect on the caregiver's physical and mental health.¹² As a direct result of these increased responsibilities, the employment of family military caregivers has also taken a significant toll, especially on

briefs/RB9700/RB9764/RAND_RB9764.pdf (“Many veterans of [the Afghanistan and Iraq Wars] and earlier conflicts rely for their day-to-day needs on care provided by family or friends.”).

7. *See id.*

8. Kristine Froeba, *Oldest US World War II Veteran Dies at 112 in New Orleans*, ARMY TIMES (Jan. 5, 2022), <https://www.armytimes.com/military-honor/salute-veterans/2022/01/05/oldest-us-world-war-ii-veteran-dies-at-112-in-new-orleans/>.

9. *See* RAMCHAND ET AL., *supra* note 6, at 2; Elizabeth Dole, *Let's Answer Dr. Jill Biden's Call to 'Join Forces'*, MILITARY.COM (Jan. 26, 2021), <https://www.military.com/daily-news/opinions/2021/01/26/lets-answer-dr-jill-bidens-call-join-forces.html>.

10. Kait Hanson, *Military Kids Are 'Hidden Heroes' Who Help Care for Veterans in Need*, TODAY (Nov. 16, 2021, 8:13 AM), <https://www.today.com/today/amp/tdna239048>.

11. ELIZABETH DOLE FOUND., SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE 4 (2019), <https://hiddenheroes.org/wp-content/uploads/2019/09/Military-Caregiving-Employer-Toolkit.pdf> [hereinafter SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE].

12. JESSICA D. STRONG, JENNIFER L. AKIN, KIM D. HUNT, CHARO BATES, DREW S. BRAZER, KARLY HOWELL, JENNIFER OLSEN, LAUREN S. TOBIAS, ROSALINDA V. MAURY, RACHEL K. LINSNER & JEANETTE YIH HARVIE, CAREGIVING IN MILITARY FAMILIES: 2020 MILITARY FAMILY LIFESTYLE SURVEY SPECIAL REPORT 18 (2021), https://bluestarfam.org/wp-content/uploads/2021/06/BSF_RCI_Caregiving_Report_2021.pdf.

military spouses.¹³ “Frequent moves and transfers, state licensing requirements, child care [costs and related obligations], caregiving, and deployments, all contribute to the [distinctive] challenges military spouses face [when trying to build] sustainable and long-term careers.”¹⁴ As a result, such challenges negatively affect military spouses’ careers and often persist throughout the life of their careers.¹⁵ In late 2021, First Lady Jill Biden referred to this growing problem as “a national security imperative.”¹⁶

Certain legal protections already exist that apply to service members and veterans and their family caregivers. One notable legal protection is the Americans with Disabilities Act (ADA), which prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment because the individual has a disability, a history of having a disability, or because the employer regards the individual as having a disability.¹⁷ In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the ADA prohibits discrimination against qualified applicants and employees because of the disability of an individual with whom the applicant or worker has a relationship or an association,

13. Laura Reiley, *The Rising Cost of Being in the National Guard: Reservists and Guardsmen Are Twice as Likely to Be Hungry as Other American Groups*, WASH. POST (June 22, 2021, 3:33 PM), <https://www.washingtonpost.com/business/2021/06/22/hunger-national-guard-reserves/> (“Even [before the COVID-19 pandemic], military spouses have higher levels of unemployment or underemployment than civilian populations, citing factors like job scarcity near military bases and frequent moves. Moving around can leave military families far from their extended families and increase a nonmilitary partner’s child care burden.”).

14. *Joining Forces*, THE WHITE HOUSE, <https://www.whitehouse.gov/joiningforces/> (last visited Mar. 31, 2023); see also Reiley, *supra* note 13.

15. Taren E. Wellman, *Employment Discrimination Against Military Spouses: A Case for Illegality Contrary to Popular Belief and Practice*, 79 A.F. L. REV. 207, 210 (2018).

16. Terri Moon Cronk, *First Lady Calls Military Spouse Employment a National Security Imperative*, U.S. DEP’T OF DEF. (Oct. 26, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2823330/first-lady-calls-military-spouse-employment-a-national-security-imperative/>; see also JOINING FORCES INTERAGENCY POL’Y COMM., *STRENGTHENING AMERICA’S MILITARY FAMILIES* (2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/Strengthening_Americas_Military_Families.pdf [hereinafter JOINING FORCES INTERAGENCY POL’Y COMM., *STRENGTHENING AMERICA’S MILITARY FAMILIES*].

17. See 42 U.S.C. § 12112(a); see also *Guide to Disability Rights Laws*, U.S. DEP’T OF JUST., C.R. DIV., (June 16, 2022), <https://www.ada.gov/cguide.htm>.

such as a child, spouse, or parent.¹⁸ Under this “association provision,” an employer may not treat an applicant or worker less favorably based on stereotypical assumptions about that person’s ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability.¹⁹

The Family and Medical Leave Act (FMLA) is another vital employment law protection that requires covered employers to provide employees with job-protected, unpaid leave for qualified family and personal medical reasons.²⁰ It also requires employers to maintain group health benefits for employees on leave.²¹ In 2008, the FMLA was specifically amended to address the needs of military families by providing employment legal protections for service members and military family caregivers.²² The FMLA protections for service members and their families were later expanded by Congress in 2009 when Congress broadened definitions and eligibility requirements to give greater benefits to injured or ill service members and their caregivers.²³ The FMLA protections were again strengthened with the U.S. Department of Labor’s (DOL) implementing regulations enacted in 2013 by further broadening coverage.²⁴

Another important, yet often overlooked, legal protection unique to the military caregiver demographic is the Uniformed Services Employment and Reemployment Rights Act of 1994

18. See § 12112(b)(4).

19. See Alicia H. Koepke, *Adverse Employment Actions Based on Associational Disability Discrimination*, 92 FLA. BAR J. 52, 52 (2018) (discussing the association provision); § 12112(b)(4).

20. See Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2612(a)(1)(C)–(D), 2614(a)(1).

21. See *id.* § 2614(c)(1).

22. See *id.* § 2612(a)(3); see also GERALD MAYER, CONG. RSCH. SERV., THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW, R42758, at 1 (2012), <https://sgp.fas.org/crs/misc/R42758.pdf>.

23. See MAYER, *supra* note 22, at 1.

24. See CASEY KURTZ & MARK T. PHILLIS, LITTLER MENDELSON P.C., DOL RELEASES NEW REGULATIONS EXPANDING LEAVE ENTITLEMENT FOR MILITARY CAREGIVERS AND FLIGHT CREW MEMBERS 1–2 (2013), https://www.littler.com/files/press/pdf/2013_02_ASAP_DOL_Regulations_Expand_Leave_Entitlement_Military_Caregivers_and_Flight_Crew.pdf; see also 29 C.F.R. § 825.122 (providing definitions for “covered servicemember” and their family members).

(USERRA), which makes it unlawful for employers to discriminate or retaliate against service members based on their military service.²⁵ Specifically, USERRA prohibits retaliation and discrimination against service members in employment based on their past, present, or future participation in the military.²⁶ USERRA also provides employees with a variety of leave entitlements for absences related to military service.²⁷ In addition, USERRA provides specific protections for service members who incur disabilities during their military service and requires employers to make reasonable attempts to accommodate service-related disabilities or to offer employment in an equivalent position if such accommodations are not available.²⁸ USERRA is a highly consequential employment protection statute that has no statute of limitations or exhaustion requirement, applies to virtually all employers and employees, and allows for equitable and monetary relief, which includes the recovery of backpay, attorney's fees and costs, and liquidated damages for willful violations.²⁹ All these characteristics demonstrate that USERRA is one of the more robust employment statutes even though it receives considerably less attention.

This Article examines the employment law protections available to family caregivers of military service members. Part I of this Article discusses the background and historical roots of the military caregiver situation. Part II explores the existing legal protections available for military family caregivers, including the ADA, USERRA, the FMLA, and comparable laws at the state and local level. Part III shifts to discuss best practices employers should consider for their military caregiver employees based on best practices

25. See 38 U.S.C. §§ 4311(a), 4312(a).

26. See *id.* § 4311(a).

27. See *id.* § 4316.

28. See *id.* § 4313(a)(3); 20 C.F.R. §§ 1002.225–.226.

29. See 20 C.F.R. § 1002.311; 38 U.S.C. §§ 4303(3), (4)(A), 4311, 4323(d)–(e), (h); Bradford J. Kelley, *For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA*, 127 PA. STATE L. REV. 57, 61 (2022).

recommended by federal agencies and the private sector. Part III also discusses specific best practices for employers to implement, such as flexible schedules and remote opportunities, expanding leave policies, and enhancing employee assistance programs. Finally, Part IV contains positive suggestions for how to address the growing challenges military caregivers face and how the problems can be ameliorated, including legislative actions at the federal and state level. Part IV further argues that federal and state agencies need to engage in targeted outreach and issue guidance.

I. BACKGROUND

In order to understand the urgent need for stronger legal protections for family military caregivers, it is important to recognize the current challenges, responsibilities, and consequences that military caregivers face. This Part discusses the myriad of problems they encounter at home and at the workplace.

A. *Challenges for Military Caregivers*

Many scholars, military leaders, and politicians have long acknowledged that decades of conflict in Iraq and Afghanistan significantly increased the demand for military caregivers.³⁰ Veteran families, caregivers, and survivors continue to face enduring challenges stemming from the lengthy wars.³¹ According to a 2014 landmark study of caregivers' needs, the RAND Corporation found that of the estimated 5.5 million military caregivers, nearly 20% are caring for post-9/11 veterans.³²

30. See, e.g., Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 46–48 (2009).

31. *Id.*

32. RAMCHAND ET AL., *supra* note 6, at 2.

Military and veteran families face similar challenges as their fellow [non-military] . . . families [caring for those with disabilities], but with the additional [challenges stemming from] deployments; frequent moves with little control over geographic location; caregiving for wounded, ill, and injured service members and veterans; separations caused by training or hardship duties; and more.³³

Medical advances over the last several years have helped veterans survive injuries that were considered fatal in the past.³⁴ The high percentage of injuries and illnesses resulting from over two decades of war has created a group of military caregivers assisting veterans with long-term ailments who are younger than their civilian caregiving counterparts.³⁵ However, with decreasing fatalities due to medical advances, “the percentage of veterans who report having service-connected disabilities . . . has [steadily] risen” in the last several years, including “disabilities that were incurred in, or aggravated during, military service.”³⁶ In particular, post-9/11 veterans have the highest rates of service-connected disabilities.³⁷ Whereas about 25% of veterans have a service-connected disability, 41% of post-9/11 veterans have one.³⁸ Veterans with

33. JOINING FORCES INTERAGENCY POL’Y COMM., STRENGTHENING AMERICA’S MILITARY FAMILIES, *supra* note 16.

34. Vespa, *supra* note 3.

35. Lee Woodruff, *Stemming the Rise of Suicide Among Military Family Caregivers*, AARP (July 14, 2021), <https://www.aarp.org/caregiving/health/info-2021/military-caregiver-suicide.html>.

36. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2020-5, UNDERSTANDING YOUR EMPLOYMENT RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR VETERANS (2020), <https://www.eeoc.gov/laws/guidance/understanding-your-employment-rights-under-americans-disabilities-act-guide-veterans> [hereinafter UNDERSTANDING YOUR EMPLOYMENT RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR VETERANS]; *see also* Vespa, *supra* note 3 (“More than one third (1.5 million) of the nearly 3.8 million men and women who have served in the U.S. Armed Forces since September 2001 and are veterans, have a service-connected disability.”).

37. Vespa, *supra* note 3.

38. UNDERSTANDING YOUR EMPLOYMENT RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR VETERANS, *supra* note 36.

service-related disabilities face injuries such as “missing limbs, spinal cord injuries, burns, post traumatic stress disorder (PTSD), hearing loss, [and] traumatic brain injuries” – injuries that in prior wars would have resulted in death.³⁹ Consistent with medical advances, health care professionals are more effectively and accurately diagnosing injuries and conditions such as post-traumatic stress disorder.⁴⁰

Considering these varying disabilities, military caregivers usually provide two types of support: “activities of daily living” and “instrumental activities of daily living.”⁴¹ Activities of daily living “include bathing, dressing, feeding, [and] toileting.”⁴² In contrast, instrumental activities of daily living “include issuing [and refilling] medications, . . . managing finances, . . . preparing meals, providing transportation, and/or coordinating physical and/or mental health treatments.”⁴³ For example, one military caregiver noted that she helps her veteran husband with “managing his appointments and medications, monitoring his amputation sites for infection, and putting on his prosthetics.”⁴⁴

Spouses of disabled military service members primarily serve in the role of family caregivers.⁴⁵ These individuals balance their caregiving responsibilities with the often overlooked challenges of a military lifestyle.⁴⁶ They deal with relocations, deployments, extended separation from family, isolation from friends, financial insecurity, barriers to their own employment, and maintaining the welfare of their whole family, especially dealing with challenges to mental health.⁴⁷ One comprehensive

39. *Id.*

40. See Vespa, *supra* note 3.

41. Corrine E. Hinton, *Unintended Consequences: Intimate Partner Violence, Military Caregivers, and the Law*, 6 J. VETERANS STUD. 211, 212 (2020).

42. *Id.*

43. *Id.*

44. *Georgette Wenton*, ELIZABETH DOLE FOUND., <https://hiddenheroes.org/story/georgette-wenton/> (last visited Mar. 31, 2023).

45. See Hinton, *supra* note 41, at 212.

46. See STRONG ET AL., *supra* note 12, at 6.

47. See *id.* at 5; Simone Gorrindo, *The Pandemic's Pressure on Military Spouses*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/parenting/military-family-coronavirus.html>.

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“study found that military caregivers suffer depression, anxiety, family strain, financial struggles and legal challenges at higher rates than their civilian peers.”⁴⁸ In 2021, the University of Texas Health Science Center at San Antonio released a study showing the alarming frequency of suicidal thought among military caregivers.⁴⁹ The study showed that nearly 24% of survey respondents had thought about suicide since becoming a caregiver.⁵⁰ The study noted that “[c]aregivers of people with mental health issues like traumatic brain injury, anxiety disorders, Alzheimer’s and PTSD are at a higher risk for suicidal tendencies than those caring for people with physical injuries like burns or amputations.”⁵¹ Additionally, military caregivers cover a cost that would otherwise be braced by the nation, amounting to about fourteen billion annually in veteran care.⁵² Sixty-one percent of military caregivers provide veteran care while also maintaining a job.⁵³

Many family caregivers are caring for multiple individuals within their families.⁵⁴ For example, a recent study shows that 35% of caregivers in military families also care for a child who has special needs, and approximately 28% of military caregivers also care for a parent or grandparent.⁵⁵ In 2021, the White House’s *Joining Forces* initiative reported that “approximately 2.3 million children under the age of [eighteen] liv[e] with a disabled veteran.”⁵⁶ Furthermore, the initiative also reported

48. Dole, *supra* note 9.

49. See Woodruff, *supra* note 35; Roxana E. Delgado, Kimberly Peacock, Chen-Pin Wang & Mary Jo Pugh, *Phenotypes of Caregiver Distress in Military and Veteran Caregivers: Suicidal Ideation Associations*, PUB. LIBR. OF SCI. ONE, June 11, 2021, at 9–10.

50. Woodruff, *supra* note 35.

51. *Id.*

52. SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE, *supra* note 11.

53. Nancy Kerr, *Credit for Caring Act Would Provide Tax Credit to Family Caregivers*, AARP (July 15, 2021), <https://www.aarp.org/caregiving/financial-legal/info-2021/new-credit-for-caring-act.html>.

54. STRONG ET AL., *supra* note 12, at 6.

55. *Id.* at 14.

56. *Joining Forces and Hidden Helpers Coalition Pledge Support to Military and Veteran Children in Caregiving Families*, WHITE HOUSE: BLOG (Nov. 10, 2021), <https://www.whitehouse.gov/>

that “[c]hildren from military caregiving homes are more likely than children in non-caregiving homes to have high levels of anxiety and depression.”⁵⁷

Military family caregivers also face serious employment challenges. Caregivers in military families, especially military spouses, report that unemployment and underemployment were the primary issues contributing to their financial stress.⁵⁸ In 2019, before the COVID-19 pandemic, an Active Duty Spouses Survey from the Department of Defense showed that the “military spouse unemployment rate [was] approximately [22%]”; in 2021, one year into the pandemic, the rate spiked to 38%.⁵⁹ As a result of these dismal unemployment rates, a significant percentage of military families—39%—reported that they are reconsidering their active-duty military service status.⁶⁰

Compared to civilians, military spouses face significant challenges in obtaining employment for several reasons.⁶¹ As an initial matter, military families are constantly moving to different postings within the United States and abroad.⁶² For many military families, this means a change of duty station move every two to three years.⁶³ Such mobility means that military spouses must find work opportunities that are

joiningforces.blog/2021/11/10/joining-forces-and-hidden-helpers-coalition-pledge-support-to-military-and-veteran-children-in-caregiving-families/.

57. *Id.*

58. STRONG ET AL., *supra* note 12, at 26.

59. *Joining Forces*, *supra* note 14; *Shaping the Future of Military Spouse Employment by Advocating for Legislative Action*, HIRING OUR HEROES, <https://www.hiringourheroes.org/2021-military-spouse-employment-summit-highlights/> (last visited Mar. 31, 2023).

60. James R. Webb, *New White House Report Seeks Employment, Quality of Life Improvements for Military Families*, MIL. TIMES (Sept. 30, 2021), <https://www.militarytimes.com/pay-benefits/mil-money/2021/09/30/new-white-house-report-seeks-employment-quality-of-life-improvements-for-military-families/>.

61. See Lindsay Dickey, *Military Spouse: An Unprotected Class*, MILITARY SPOUSE, <https://www.militaryspouse.com/career/military-spouse-an-unprotected-class/> (last visited Mar. 31, 2023).

62. See *Spouses Continue to Face Employment Challenges*, ASS'N OF THE U.S. ARMY (Mar. 22, 2021), <https://www.ausa.org/news/spouses-continue-face-employment-challenges>.

63. *Taking Care of Our People*, U.S. DEP'T OF DEF., <https://www.defense.gov/Spotlights/Taking-Care-of-Our-People/> (last visited Mar. 31, 2023).

portable.⁶⁴ Military spouses consistently cite relocation as a major reason employers refuse to hire them.⁶⁵ As a result, many are hesitant to openly inform potential employers that they are a military spouse, because this could decrease the prospects of receiving a job offer.⁶⁶ Military spouses face further employment challenges because it is difficult to transfer state-based professional licenses and credentials as they move from state to state.⁶⁷ Communicating one's caregiving responsibilities to prospective employers may add an additional roadblock in the already difficult job search for military spouses.⁶⁸ Those who become military caregivers while employed face greater difficulties than their coworkers when competing for promotions or avoiding layoffs or termination.⁶⁹ Furthermore, hiding caregiving responsibilities from employers places a greater daily strain on military caregivers.⁷⁰

B. COVID-19 and New Challenges

The COVID-19 pandemic has further exacerbated the employment problems that many military members face,

64. JOINING FORCES, STRENGTHENING AMERICA'S MILITARY FAMILIES, *supra* note 16, at 9.

65. See Gordon, *supra* note 62.

66. See, e.g., DEBORAH A. BRADBARD, ROSALINDA MAURY & NICHOLAS J. ARMSTRONG, THE FORCE BEHIND THE FORCE: CASE PROFILES OF SUCCESSFUL MILITARY SPOUSES BALANCING EMPLOYMENT, SERVICE, AND FAMILY 9 (2016), https://ivmf.syracuse.edu/wp-content/uploads/2016/11/TheForceBehindtheForceCaseProfilesofSuccessfulMilitarySpousesBalancingEmploymentServiceandFamilyACC_03.02.18.pdf ("Military spouse job candidates may have concerns they will not be hired if they disclose their military spouse status."); 3 *Surprising Things About Military Spouses in the Workplace*, HIRING OUR HEROES, <https://www.hiringourheroes.org/military-spouses-in-the-workplace/> (last visited Mar. 31, 2023) ("[M]ilitary spouses have been reluctant to disclose [their] non-visible identity."); Rebecca Alwine, *What Do Employers Really Think of Military Spouse Job Seekers?*, MILITARY FAMS. MAG. (Jan. 4, 2020), <https://militaryfamilies.com/military-employment/what-do-employers-really-think-of-military-spouse-job-seekers/> (stating how a business owner located in a heavily populated military area reported "[k]nowing [military spouses] are often hesitant to reveal their status").

67. See Gordon, *supra* note 62.

68. See SHERMAN GILLUMS JR., PAVING ACCESS TO EMPLOYMENT FOR AMERICA'S HIDDEN HEROES: CREATING A MILITARY CAREGIVER-FRIENDLY WORKPLACE 3 (2021), <https://pva.org/wp-content/uploads/2021/09/creating-a-military-caregiver-friendly-workplace-1.pdf>.

69. See *id.* at 5.

70. See *id.*

especially National Guard members who experience “longer deployments and periods of activation.”⁷¹ During the course of the COVID-19 pandemic, National Guard members and Reservists provided coronavirus testing, administered vaccines, distributed food to food banks across the country, and mitigated civil unrest.⁷² In addition to their more traditional duties, such as responding to natural disasters such as floods and wildfires, National Guard members and Reservists were also called upon to serve as teachers, janitors, and bus drivers during the pandemic.⁷³

The COVID-19 pandemic has also acutely worsened the employment problems faced by many military members and their caregivers.⁷⁴ A study from the COVID-19 Military Support Initiative identifies several ways the pandemic has affected military families.⁷⁵ For example, military families have reported increases in stress, mental health concerns, and other unaddressed mental health needs.⁷⁶ The study shows that 20% of medical providers located on military bases during the pandemic lacked access to childcare.⁷⁷ As a result of school closures, military families, who relied on programs such as those providing free or reduced lunch, struggled to access the food they needed.⁷⁸ Ultimately, these families turned to other means like seeking emergency food assistance.⁷⁹

71. See Reiley, *supra* note 13.

72. *Id.*; see also Sonderling, *supra* note 2.

73. Hannah Knowles & Karoun Demirjian, *Omicron Slammed Essential Workers. So the National Guard Became Teachers, Janitors and More.*, WASH. POST (Feb. 18, 2022, 6:00 AM), <https://www.washingtonpost.com/health/2022/02/17/national-guard-covid/>; Sonderling, *supra* note 2.

74. See *8 Ways COVID-19 Has Affected Military & Veteran Families*, BOOZ ALLEN HAMILTON, <https://www.boozallen.com/insights/covid-19/8-ways-covid-19-has-affected-military-and-veteran-families.html> (last visited Mar. 31, 2023).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

C. Public Policy Concerns: A National Security Imperative

The modern problems that military members and their caregivers face have important underlying public policy issues at stake. Some scholars have found that the main reason service members decided to “enlist, reenlist, or separate from the military is the level of their spouse’s and family’s contentment with the military as an employer.”⁸⁰ Every branch of the military has struggled with retention and recruitment in recent years.⁸¹ Widespread school closures and public event cancellations as a result of the COVID-19 pandemic have worsened the military’s recruitment problems by making it more difficult to go to schools and public events to solicit recruits.⁸²

This problem of military retention is not going unnoticed. In October 2021, First Lady Jill Biden raised concern about military retention, “refer[ing] to the problem as ‘a national security imperative’” due to the “concerning” statistics.⁸³ The First Lady noted that “[a]lmost 40% of military families said that they have considered leaving active-duty service because of challenges with spouse employment.”⁸⁴ Gilbert R. Cisneros Jr., the Undersecretary of Defense for Personnel and Readiness, echoed the First Lady’s remarks by stating, “[t]he retention of qualified service members is essential to mission readiness” and “[w]hen military spouses are satisfied with their career and employment options, they are much more likely to support their service members’ continued service.”⁸⁵

80. Marcy L. Karin & Katie Onachila, *The Military’s Workplace Flexibility Framework*, 3 AM. U. LAB. & EMP. L.F. 153, 160 (2013).

81. See Lisa Limb, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*, 117 MICH. L. REV. 761, 781–82 (2019).

82. Lolita C. Baldor, *Army Offers Recruits up to \$50K Bonus as Pandemic Takes Toll*, ARMY TIMES (Jan. 12, 2022), <https://www.armytimes.com/news/your-army/2022/01/12/army-offers-recruits-up-to-50k-bonus-as-pandemic-takes-toll/>.

83. Jessica Dickler, *The Unemployment Rate Among Military Spouses Spiked During COVID*, CNBC (Nov. 11, 2021, 7:30 AM), <https://www.cnbc.com/2021/11/11/the-unemployment-rate-among-military-spouses-spiked-during-covid.html>.

84. *Id.*

85. Cronk, *supra* note 16.

As a corollary to retention issues, recruitment is also negatively impacted.⁸⁶ As President George Washington once stated, “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their country.”⁸⁷ In other words, to improve military recruitment and avoid this national security concern, it is important that veterans are treated properly after their service, which includes having family involved in their care.⁸⁸ When a family caregiver is actively involved in a veteran’s recovery, the veteran can be cared for at home with their loved ones instead of receiving care at a permanent care facility.⁸⁹ When family caregivers are fully aware of the veteran’s conditions and daily progress, they are also in the best position to advocate for and increase public awareness of those needs.⁹⁰ While this is ideal, being a caregiver is no easy task.⁹¹ When asked for one piece of advice to offer other military and veteran caregivers, one caregiver said, “[s]tay strong in expressing your concerns for your veteran. You know your veteran better than anyone else”⁹² Former Senator Elizabeth Dole testified before the Senate that “most Americans have no idea what is going on in military homes today.”⁹³ She accurately pointed out that “[o]ur Nation has long admired and respected our military men and women who have served our country so valiantly.”⁹⁴ However, Senator Dole

86. See Kelley, *supra* note 1, at 404–06.

87. *Id.* at 404–05.

88. See *id.* at 404–06.

89. THE MIL. FAM. RSCH. INST. AT PURDUE UNIV., HOW TO HELP MILITARY & VETERAN FAMILIES (2019), https://www.mfri.purdue.edu/wp-content/uploads/2019/05/HowToHelp_FamilyCaregivers.pdf.

90. See *id.*

91. See *id.*

92. Krista Petterson, HIDDEN HEROES, <https://hiddenheroes.org/story/krista-petterson/> (last visited Mar. 31, 2023).

93. *Military Caregivers: Families Serving for the Long Run: Hearing Before the Special Comm. on Aging*, 115th Cong. 17 (2017), <https://www.congress.gov/115/chrp/CHRG-115shrg30021/CHRG-115shrg30021.pdf>.

94. *Id.* at 7.

explained that “[t]he caregivers from pre-9/11 have been providing services for years . . . [t]hey are not acknowledged for what they are doing, and they are receiving very, very little in the way of services.”⁹⁵ The national security issue created by this situation will only become more pronounced with time. Accordingly, an evaluation of the relevant employment law protections is an appropriate first step towards ameliorating this issue.

II. EMPLOYMENT LAW PROTECTIONS FOR MILITARY CAREGIVERS

Workers with caregiving responsibilities are not a protected class under any federal employment anti-discrimination statute and under most state laws; only a few states provide legal protections for workers with caregiving responsibilities.⁹⁶ Instead, military caregivers must refer to complex and flawed federal, state, and local laws and regulations to seek protection against discrimination based on family responsibilities and related claims.⁹⁷ While the ADA, FMLA, Title VII, USERRA, and corresponding state laws afford some legal protections, the “holes” between these statutes often serve to render the web ineffective to the detriment of not only caregivers but also the military veterans they serve.⁹⁸ This Part explores the existing employment law protections for military caregivers by highlighting the limited strengths of the existing protections.

95. *Id.* at 11–12.

96. See Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 790 (2010).

97. See Leanne Fuith & Susan Trombley, *COVID-19 and the Caregiving Crisis: The Rights of Our Nation’s Social Safety Net and a Doorway to Reform*, 11 UNIV. MIA. RACE & SOC. JUST. L. REV. 159, 175 (2021).

98. See *id.* at 183; *infra* Sections II.A–G. Scholars and others have varied about what legal protections exist for caregivers generally. See, e.g., Fuith & Trombley, *supra* note 97, at 182–83; Nicole Buonocore Porter, *Why Care About Caregivers?: Using Communitarian Theory to Justify Protection of ‘Real’ Workers*, 58 KAN. L. REV. 355, 370 (2010) [hereinafter *Why Care About Caregivers?*]. For instance, Professor Nicole Buonocore Porter argues that even though there are several potential laws that “caregivers could use to challenge discrimination by their employers, arguably three main prohibitions are most often used: Title VII’s prohibition against sex discrimination, the Pregnancy Discrimination Act, and the FMLA.” *Why Care About Caregivers?*, *supra*, at 370.

Because most of the current legal protections are woefully inadequate,⁹⁹ this Part also examines the weaknesses of these available protections.

A. *Protections for Individuals with Disabilities*

1. *Federal ADA*

The ADA was passed in 1990 with overwhelming support in the House and the Senate to establish a comprehensive national mandate to eliminate discrimination against disabled individuals.¹⁰⁰ Similar majorities amended the ADA in 2008, which had the effect of significantly expanding the ADA's protections to more disabilities than were previously covered.¹⁰¹ Title I of the ADA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and prohibits employers with fifteen or more employees from discriminating against a qualified individual with a disability.¹⁰² An individual with a disability is defined as someone who has "a physical or mental impairment that substantially limits one or more major life activities," has "a record of such an impairment," or is "regarded as having such an impairment."¹⁰³ The term "major life activities" encompasses a wide range of bodily functions, including many of those experienced by military personnel.¹⁰⁴

99. See, e.g., Buonocore Porter *supra* note 96, at 790–98.

100. See 42 U.S.C. § 12101(b)(1); see also Marcy Karin, Lara Bollinger & UDC Law Staff, *Disability Rights: Past, Present, and Future: A Roadmap for Disability Rights*, 23 UDC L. REV. 1, 1 (2020).

101. See Karin et al., *supra* note 100, at 1–2 (noting that the 2008 ADA amendments passed with bipartisan support as well as with the significant support from disability advocacy groups and allies of the disability community); see also MARGARET HART EDWARDS & PATRICK F. MARTIN, LITTLER MENDELSON P.C., CONGRESS TELLS THE COURTS HOW TO INTERPRET THE ADA 1–2 (2008), https://www.littler.com/files/press/pdf/2008_09_ASAP_CongressTells_CourtsHowTo-InterpretADA.pdf (explaining that the amendments "directly overturn[ed] several decisions of the U.S. Supreme Court interpreting" the ADA and noting that "[t]he ADA sends an unmistakable message to the courts that the concept of disability is to be more broadly, rather than narrowly, construed").

102. See 42 U.S.C. §§ 12112(a), 2000e–4, 12117(a); §§ 12111(2), (5)(A).

103. See *id.* § 12102(1); see also 29 C.F.R. § 1630.2(g)(1) (2022).

104. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(i).

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This broad interpretation provides ADA protections to more military personnel who experience a wide range of conditions.¹⁰⁵ Applicants and employees are also protected from retaliation, interference, coercion, and intimidation with the exercise of their rights under the ADA.¹⁰⁶

The ADA includes a reasonable accommodation provision which requires covered employers to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”¹⁰⁷ Generally, undue hardship to the employer refers to “an action requiring significant difficulty or expense, when considered in light of” several statutory factors such as the employer’s size, financial resources, and the needs of the business.¹⁰⁸ After an employee makes a request for an accommodation, the employer then has a duty to engage in an “interactive process” to identify a reasonable accommodation that allows the employee to effectively perform his or her job.¹⁰⁹

The ADA contains an explicit provision, commonly known as the “association provision,” which prohibits “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual

105. See 29 C.F.R. § 1630.2(i) (2022). Major life activities may include, but are not limited to, “[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working” as well as “[t]he operation of a major bodily function, including[,] [without limitation,] functions of the immune system . . . ; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”

106. 42 U.S.C. § 12203(a)–(b).

107. *Id.* § 12112(b)(5)(A).

108. 42 U.S.C. § 12111(10).

109. See *O'Donnell v. Univ. Hosps. Cleveland Med. Ctr.*, 833 F. App'x 605, 617 (6th Cir. 2020). During the interactive process, the employer and employee are required to identify the exact “limitations resulting from the disability and potential reasonable accommodations that could overcome these limitations.” *Id.* In addition, the ADA mandates that the parties act in good faith. See *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014).

with whom the qualified individual is known to have a relationship or association.”¹¹⁰ The EEOC’s regulations establish broader protection by also prohibiting employers from otherwise discriminating against qualified applicants or employees because of their association with an individual the employer knows to have a disability.¹¹¹ In 2005, the EEOC issued a technical assistance document on the ADA’s association provision explaining that “[t]he purpose of the . . . provision is to prevent employers from taking adverse actions [against applicants or employees] based on unfounded stereotypes and assumptions about individuals who” care for persons with disabilities.¹¹² The technical assistance document notes that the association or relationship does not need to be a family member.¹¹³ However, most courts have found that casual associations such as friendships with disabled individuals are not protected under the ADA.¹¹⁴ The EEOC’s guidance identifies several examples of conduct prohibited under the ADA’s association provision.¹¹⁵ For instance, it is unlawful for an employer to refuse to hire an applicant associated with an individual with a disability based on an assumption that the applicant will have excessive absences from work or be an unreliable employee.¹¹⁶ An employer also cannot “deny an employee . . . a promotion or other opportunities for advancement” or “subject [an employee] to harassment”

110. 42 U.S.C. § 12112(b)(4); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2005-4, QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA (2005), <https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada> [hereinafter QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA].

111. 29 C.F.R. § 1630.8 (2022).

112. QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110. Courts have explained that the provision “was apparently inspired in part by testimony before House and Senate Subcommittees pertaining to a woman who was fired from her long-held job because her employer found out that the woman’s son, who had become ill with AIDS, had moved into her house so she could care for him.” *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1082 (10th Cir. 1997); *see* EEOC v. STME, LLC, 938 F.3d 1305, 1318–19 (11th Cir. 2019).

113. QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110.

114. Koepke, *supra* note 19.

115. QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110.

116. *Id.*

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because the employee is “associat[ed] with a person with a disability.”¹¹⁷ Despite these protections, the EEOC’s guidance clarifies that the ADA does not “require an employer to provide a reasonable accommodation to a person without a disability due to that person’s association with someone with a disability.”¹¹⁸

Generally, courts have held that an ADA associational discrimination claim requires a plaintiff to allege that they were: (1) “qualified for the job at the time of an adverse employment action”; (2) “subjected to adverse employment action”; (3) the employer knew that a relative or other associate of the plaintiff was disabled; and (4) “that the adverse employment action occurred under circumstances [that] rais[e] a reasonable inference that the disability of the relative or associate was a determining factor in the employer’s decision.”¹¹⁹ This final element is the crux of any associational discrimination claim under the ADA.

Courts have recognized three theories of ADA associational discrimination.¹²⁰ The first theory is known as the “expense theory” and addresses discrimination where an employee or applicant “suffers [an] adverse action because of [their] association with a disabled individual covered by the employer’s insurance, which the employer believes (rightly or wrongly) will be costly.”¹²¹ The second theory is known as the “disability by association” theory and is a rarer claim that arises in cases where an employer fears that because of an association, an applicant or employee may develop a disability through exposure or because of a genetic predisposition.¹²² Finally, the third theory is known as the “distraction theory” and occurs

117. *Id.*

118. *Id.*

119. *See, e.g., Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 432 (2d Cir. 2016).

120. *See, e.g., Larimer v. IBM Corp.*, 370 F.3d 698, 700 (7th Cir. 2004); *Williams v. Union Underwear Co.*, 614 F. App’x 249, 254 (6th Cir. 2015).

121. *Dolac v. Cnty. of Erie*, No. 20-2044-CV, 2021 WL 5267722, at *2 (2d Cir. Nov. 12, 2021) (quoting *Graziadio*, 817 F.3d at 432); *Larimer*, 370 F.3d at 700; *Williams*, 614 F. App’x at 254.

122. *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 487 (6th Cir. 2011).

when “an employer violates the ADA . . . [by] discriminat[ing] against an employee because the employee has been ‘somewhat inattentive at work because of the disability’ of the associated person.”¹²³ Claims based in “distraction theory” are typically the most common associational disability claim.¹²⁴

Ultimately, because most military caregivers themselves are not disabled, the ADA only affords them protection from termination or other adverse actions.¹²⁵ The ADA does not entitle them to reasonable accommodations on account of their association with disabled veterans.¹²⁶ Put differently, the ADA’s reasonable accommodation requirements are limited to accommodating qualified applicants or employees who themselves have disabilities.¹²⁷ Both the text of the statute and the EEOC’s guidance make clear that “the ADA [does] not require an employer to modify its leave policy for an employee who needs time off to care for a [family member] with a disability.”¹²⁸ However, the guidance also makes clear that “an employer must avoid treating an employee differently than other employees because of his or her association with a person with a disability.”¹²⁹

2. ADA state laws and associational discrimination

Most states have enacted their own anti-discrimination laws based on disability, several of which are modeled after the ADA.¹³⁰ While not all states have association provisions

123. *Wethington v. Sir Goony Golf of Chattanooga, Inc.*, No. 1:20-CV-00234, 2021 WL 5405039, at *6 (E.D. Tenn. Nov. 15, 2021); *Stansberry*, 651 F.3d at 487.

124. *Koepke*, *supra* note 19, at 54.

125. *See id.*

126. QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110.

127. *Id.*

128. *See id.*; compare 42 U.S.C. § 12112(b)(4) (stating that discrimination based on disability includes discrimination against a qualified individual who has an association with a disabled individual), with 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations only for individuals with disabilities).

129. QUESTIONS AND ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110.

130. *See Disability Discrimination Laws by State*, BLOOMBERG L. (Dec. 20, 2021), <https://pro.bloomberglaw.com/brief/disability-discrimination-laws-by-state/>.

identical to the ADA's,¹³¹ many have similar ones.¹³² For example, California's Fair Employment and Housing Act (FEHA) includes an association provision, and some state and federal courts have even suggested that it provides non-disabled employees associated with a disabled person with the right to a reasonable accommodation.¹³³ In *Castro-Ramirez v. Dependable Highway Express, Inc.*, the plaintiff employee, a truck driver, told his supervisor he needed to be home in the evenings to care for his son, who needed a kidney transplant, because he was the only person qualified to administer his son's daily home dialysis.¹³⁴ For a few years, the employee's supervisor accommodated this need by scheduling him for earlier shifts.¹³⁵ However, the employee was assigned a new supervisor,¹³⁶ and shortly after telling the new supervisor about his need to administer his son's dialysis, the supervisor disregarded his request which impeded with the employee's ability to care for his son.¹³⁷ The new supervisor allegedly assigned the plaintiff to a shift and route that prevented him from getting home in time to administer dialysis to his son.¹³⁸ When the employee requested to be assigned a different shift or to take the day off, his supervisor told him that he would be terminated if he did

131. See, e.g., *Matamoros v. Broward Sheriff's Off.*, No. 0:18-cv-62813-KMM, 2019 WL 4731931, at *2 (S.D. Fla. June 8, 2019) ("The FCRA [Florida Civil Rights Act] does not include an equivalent associational disability provision."); *Cain v. Burger King Corp.*, No. CV 18-20482-Civ-Scola, 2018 WL 3869127, at *2 (S.D. Fla. Aug. 14, 2018) (acknowledging that the FCRA, unlike the ADA, does not have a provision prohibiting association disability discrimination); see also *Disability Discrimination Laws by State*, *supra* note 130 ("While some of [federal, state, and local laws] are similar to those of the ADA, laws differ by state and can be very specific.").

132. See, e.g., IDAHO CODE § 67-5909 (2022); 775 ILL. COMP. STAT. ANN. 5/1-103(I)(2) (LexisNexis 2022); NEB. REV. STAT. ANN. § 48-1107.02(1)(d) (LexisNexis 2022); see also *Jones v. Live on Neb.*, No. 4:21CV3111, 2021 WL 4217145, at *3 (D. Neb. Sept. 16, 2021) (noting that NEB. REV. STAT. § 48-1107.02(1)(d) is analogous to the ADA's association provision).

133. See REBECCA PETERSON-FISHER & JENNIFER LIU, AN INTRODUCTION TO CAREGIVER DISCRIMINATION CLAIMS 6-7 (2019), https://www.americanbar.org/content/dam/aba/events/labor_law/2019/aba-annual/introduction-to-caregiver-claims.pdf.

134. *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028, 1032 (Cal. Ct. App. 2016).

135. *Id.* at 1032-33.

136. *Id.* at 1033.

137. *Id.* at 1033-34.

138. *Id.* at 1034.

not complete his assigned route.¹³⁹ When the employee told his supervisor that he could not complete the route, he was terminated.¹⁴⁰ On the same day as terminating the employee, the supervisor scheduled at least eight other drivers to earlier shifts.¹⁴¹

Significantly, the employer did not terminate the employee because the employee's son's condition was costly for the employer, nor did the employer fire him because of the belief that his son's condition would be contagious or that the health condition would distract the employee from his job duties.¹⁴² Instead, the employer did not want to accommodate the employee because it perceived the accommodation as inconvenient and as setting "bad" precedent.¹⁴³

The trial court granted summary judgment for the employer.¹⁴⁴ The California appellate court reversed, holding that the classification of associational disability claims set forth in the case law was illustrative, not exhaustive, and that the protective reach of FEHA is broader than the federal ADA.¹⁴⁵ While the court's opinion did not expressly recognize the non-disabled employee's right to a reasonable accommodation, the court held that a reasonable jury could find that the supervisor who terminated the employee "wanted to avoid the inconvenience and distraction" that the employee's caregiving responsibilities posed to the employer.¹⁴⁶ The reasoning of the case turns instead on the distraction and nuisance to the employer which is more similar to a reasonable accommodation claim than a traditional "distraction" associational disability claim.¹⁴⁷

139. *Id.*

140. *Id.*

141. *Id.*

142. PETERSON-FISHER & LIU, *supra* note 133, at 6; see *Castro-Ramierz*, 2 Cal. App. 5th at 1037.

143. See *Castro-Ramierz*, 2 Cal. App. 5th at 1043; see also PETERSON-FISHER & LIU, *supra* note 133, at 7.

144. *Castro-Ramierz*, 2 Cal. App. 5th at 1035.

145. *Id.* at 1041–42, 1051.

146. *Id.* at 1043.

147. *Id.* at 1043–44.

At least one federal court since *Castro-Ramirez* has suggested that California's FEHA extends to provide employees with reasonable accommodations necessary to care for disabled family members or associates.¹⁴⁸ In *Castro v. Classy, Inc.*, the plaintiff sought to work remotely after her child was born with a genetic mutation.¹⁴⁹ The employer refused to allow her to work from home and suggested that she find another job.¹⁵⁰ The court denied the employer's motion to dismiss the associational reasonable accommodation claim, concluding that the plain language of the FEHA indicates that non-disabled employees are entitled to associational reasonable accommodations.¹⁵¹ The court reasoned that the FEHA requires employers "to provide . . . reasonable accommodation[s]" to employees with a "physical disability."¹⁵² Because the statute's definition of "physical disability" includes a "person [who] is *associated* with a person who has, or is perceived to have, any of those characteristics," the court denied the motion to dismiss.¹⁵³ The court also denied the employer's motion to dismiss Castro's federal ADA associational disability discrimination claims, finding that she had "sufficiently alleged a causal connection between her association with her disabled child" and her employer's alleged discrimination against her.¹⁵⁴

One practitioner notes that the key takeaway from the recent California cases is that "employer[s] must tread carefully when employees request an accommodation to take care of relatives or other associated people who have a disability."¹⁵⁵ Even

148. See *Castro v. Classy, Inc.*, No. 3:19-CV-02246, 2020 WL 996948, at *4 (S.D. Cal. Mar. 2, 2020).

149. *Id.*, at *2.

150. *Id.*

151. See *id.* at *4-5.

152. *Id.* at *5.

153. *Id.* at *4-5 (citing CAL. GOV'T CODE § 12926(o)).

154. *Id.* at *3-4.

155. David M. Lester, *The Reasonable Accommodation Dilemma for Associational Discrimination*, ATKINSON, ANDELSON, LOYA, RUUD & ROMO (May 26, 2021), <https://www.aalr.com/Labor-Employment-Law-Blog/the-reasonable-accommodation-dilemma-for-associational-discrimination>.

though there is no federal requirement under the ADA to provide reasonable accommodations for associational disability discrimination, employee-friendly states such as California and others appear to be close to recognizing such a duty.¹⁵⁶ Thus, risk-adverse employers operating in employee-friendly states may want “to engage in an interactive process to determine if an accommodation can be offered that does not create an undue hardship.”¹⁵⁷

B. FMLA

Leave under the Family and Medical Leave Act is another important statutory right of many family caregivers of military members.¹⁵⁸ The FMLA requires covered employers to provide eligible employees with job-protected, unpaid leave for qualified medical and family reasons.¹⁵⁹ If an employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work.¹⁶⁰ In addition, “[i]f an employee has family member coverage, they must continue to receive family member coverage during their FMLA leave.”¹⁶¹ The regulations governing FMLA claims directly provide an employee’s right to continued medical coverage even when the employee “may be unable to return to work but expresses a continuing desire to do so.”¹⁶²

156. *See id.*

157. *Id.*

158. *See* Fuiith & Trombley, *supra* note 97, at 177–79.

159. *See* 29 U.S.C. § 2612(a). FMLA leave may be taken continuously or intermittently. *See* Fuiith & Trombley, *supra* note 97, at 179.

160. 29 U.S.C. § 2614(c)(1).

161. U.S. DEP’T OF LAB., FACT SHEET #28A: EMPLOYEE PROTECTIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT (2023), <https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections> (“To maintain insurance coverage while on FMLA leave, an employee will need to continue to make any normal contributions to the cost of the health insurance premiums.”).

162. 29 C.F.R. § 825.311(b) (“If an employee gives unequivocal notice of intent not to return to work, the employer’s obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an

Once an employee returns to work from leave, an employer must provide to the employee “the same or equivalent position” that the employee held prior to leave, including similar “benefits, pay, and other terms and conditions of employment.”¹⁶³ The FMLA also makes it “unlawful for any employer to interfere with, restrain, or deny the exercise of . . . any right provided” by the FMLA.¹⁶⁴ It is also “unlawful for any employer to discharge or . . . discriminate against any individual for opposing any practice made unlawful” under the FMLA or because of involvement in any proceeding related to the FMLA.¹⁶⁵

For an employee to be eligible to receive leave under the FMLA, the employee must have been employed for twelve months and worked 1,250 or more hours in the previous twelve months.¹⁶⁶ The employee must also work at a site with fifty or more employees within seventy-five miles of that location.¹⁶⁷ “The [U.S. Department of Labor’s (DOL)] Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees.”¹⁶⁸

Important for the caregiver community, an eligible employee of a covered employer may take up to twelve weeks of unpaid job-protected FMLA leave per year to care for a family member with a “serious health condition.”¹⁶⁹ Care for a family member includes both physical and psychological care as well as taking leave to make arrangements for changes in care and medical

employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.”).

163. See Chelsey Jonason, *Keeping Mothers in the Workplace: Shifting from McDonnell Douglas to Protect Employees Who Use FMLA Leave*, 32 ABA J. LAB. & EMP. L. 437, 440 (2017).

164. 29 U.S.C. § 2615(a)(1).

165. *Id.* § 2615(a)(2), (b).

166. *Id.* § 2611(2)(A).

167. *Id.* § 2611(2)(B)(ii).

168. U.S. DEP’T OF LAB., *supra* note 161.

169. 29 U.S.C. § 2612(a)(1)(C); see also *id.* § 2611(11) (defining “serious health condition”); 29 C.F.R. §§ 825.112–.115; *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 840 (7th Cir. 2014) (emphasizing that the FMLA “speaks in terms of ‘care,’ not ‘treatment’”).

decisions on behalf of a hospitalized parent.¹⁷⁰ An employee may use FMLA leave “intermittently or on a reduced leave schedule when medically necessary” because of a family member’s serious health condition.¹⁷¹

1. *FMLA’s specific military protections*

The original FMLA passed in 1993 did not include protections specific to military personnel or military caregivers.¹⁷² However, in 2008, in response to ongoing conflicts in Iraq and Afghanistan, Congress expanded the FMLA to include two new types of leave for military families: “qualifying exigency leave” and “military caregiver leave.”¹⁷³ The DOL subsequently issued implementing regulations in 2013.¹⁷⁴

The FMLA’s qualifying exigency leave allows the family of regular active duty service members, as well as the family of Reserve and National Guard members, to take up to twelve weeks of unpaid job-protected leave in a twelve month period for a “qualifying exigency” arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent.¹⁷⁵ The statute and its implementing regulations identify a wide range of events and activities that are considered qualifying exigencies, including “short-notice deployment,” “childcare

170. 29 C.F.R. § 825.124(a)–(b); *see also* *Romans v. Mich. Dep’t of Human Servs.*, 668 F.3d 826, 840–42 (6th Cir. 2012) (holding that an employee was entitled to take FMLA leave to decide whether to keep their mother on life support).

171. 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202(a)–(b).

172. *See* Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 49 (2009).

173. *Id.* at 46–49.

174. *See* Kurtz & Phillis, *supra* note 24, at 1–3; 29 C.F.R. § 825.122; Karin & Onachila, *supra* note 80, at 176. The 2009 expansion was significant.

First, eligibility for qualifying exigency leave was broadened to include active duty service for the regular Armed Forces. Second, a ‘covered service member’ for military caregiver leave was redefined to include veterans who served within five years of the date of treatment. Finally, ‘serious injury or illness’ was changed to include members with pre-existing injuries aggravated during active duty.

Karin & Onachila, *supra* note 80, at 176.

175. *See* 29 C.F.R. § 825.126; 29 U.S.C. § 2612(a)(1)(E).

and school activities,” “financial and legal arrangements,” “rest and recuperation,” “post-deployment activities,” “counseling,” and “military events and related activities.”¹⁷⁶ A parent of a military member may qualify for exigency leave when that individual suffers a diminished well-being with respect to their physical or mental health due to their child being deployed to a foreign country.¹⁷⁷ For example, exigency leave may be available to arrange for alternative care for the parent if the call to active duty status of the military member “necessitates a change in the existing care arrangement.”¹⁷⁸

The FMLA’s military caregiver leave allows an eligible employee who is “the spouse, son, daughter, . . . parent, or next of kin of a covered” veteran with a serious injury or illness to take up to a total of twenty-six workweeks of unpaid leave during a single twelve month period to provide care for the veteran.¹⁷⁹ A “serious injury or illness” is an injury or illness that was sustained in the line of duty or that existed prior to enlistment but was aggravated in the line of duty and meets one of four additional requirements.¹⁸⁰ Leave may be taken up to

176. 29 C.F.R. § 825.126(b).

177. *See id.* § 825.126(b)(8) (1993).

178. *Id.* § 825.126(b)(8)(i).

179. *Id.* § 825.127(a), (c)–(d); *see also* U.S. DEPT OF LAB., FACT SHEET #28M(B): MILITARY CAREGIVER LEAVE FOR A VETERAN UNDER THE FAMILY AND MEDICAL LEAVE ACT (2013), <https://www.dol.gov/agencies/whd/fact-sheets/28mb-fmla-veteran-caregiver> (“The ‘next of kin’ of a covered veteran is the nearest blood relative, other than the veteran’s spouse, parent, son, or daughter . . .”).

180. 29 C.F.R. § 825.127(c)(2)(i)–(iv) (1993). Four factors are considered:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; or (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or (iii) a physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Id.

five years after the service member leaves the military with other than a dishonorable discharge.¹⁸¹ Significantly, the regulations allow a military caregiver to take leave to care for a service member when they are on active duty and afterwards when they become a veteran.¹⁸²

Unfortunately, some commentators have argued that the leave protections afforded by the FMLA are inadequate in the caregiver context.¹⁸³ In many cases, caregivers are not eligible for FMLA leave because they work for employers that are too small to be covered by the statute or they have not worked for their employer long enough.¹⁸⁴ The statutory requirement that an employee must be employed for at least twelve months and meet the requisite hour requirement is especially limiting for military members and their families who frequently relocate.¹⁸⁵ Additionally, even if employees are entitled to FMLA leave, many cannot afford to take a leave of absence because the leave is unpaid.¹⁸⁶ Moreover, the FMLA does not account for the accommodations caregivers may require, “such as reduced or flexible schedules,” or the need “to communicate during the workday with a [family member’s] health care provider.”¹⁸⁷

181. *Id.* § 825.127(b)(2). The DOL’s regulations explain that as long as the leave begins at any point within the five-year period, it can extend beyond the five-year period. *Id.*

182. Kurtz & Phillis, *supra* note 24, at 2; see 29 C.F.R. § 825.127 (b)(2).

183. See, e.g., Buonocore Porter, *supra* note 96, at 790–91 (discussing the limitations of the FMLA, including the employer size requirement, the employee duration requirement, the fact that leave is unpaid, and that leave can only be taken in certain enumerated situations).

184. See *supra* notes 166–67 and accompanying text (discussing how eligibility for FMLA protections requires the employee to have worked at that company for at least twelve months and for at least 1,250 hours of service during the previous twelve-month period which constitutes an average of twenty-five hours per week for one year).

185. See *Joining Forces*, *supra* note 14 (“Frequent moves . . . contribute to the unique challenges military spouses face to building sustainable and long-term careers.”).

186. See 29 U.S.C. § 2612(c); see also STRONG ET AL., *supra* note 12, at 21; Jo Ann Jenkins & Kathy Roth-Douquet, *It’s Time to Do More for Our Nation’s Military Veteran Caregivers*, AUSTIN AMERICAN-STATESMAN (Aug. 31, 2021, 8:00 AM), <https://www.statesman.com/story/opinion/columns/more-voices/2021/08/31/its-time-do-more-our-nations-military-veteran-caregivers/5578193001/>.

187. Lisa P. Wiggin, *The Silver Tsunami: Employment Law Reform to Protect Family Caregivers of the Aging Population*, 93 N.Y.U. L. REV. 159, 167 (2018) (quoting JOAN C. WILLIAMS, ROBIN DEVAUX, PATRICIJA PETRAC & LYNN FEINBERG, AARP PUB. POL’Y INST., PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 8 (2012)).

2. *State FMLA laws*

A number of states have corresponding FMLA laws that provide specific military leave protections.¹⁸⁸ However, most of these state laws narrowly address deployment-related leave rather than broader family responsibilities.¹⁸⁹ Additionally, the coverage under state laws vary in scope and eligibility.¹⁹⁰ For example, some of the state laws expand protections beyond those provided by the FMLA to cover more employers.¹⁹¹ Other states extend coverage by providing time off for spouses and other specified family members.¹⁹² The length of time available for leave also varies among the state laws, though most states provide at least some unpaid leave.¹⁹³

Moreover, a growing number of states in recent years have provided paid leave.¹⁹⁴ As of January 1, 2021, Massachusetts provides paid family military leave for employees to care for an active duty family member or “to manage a qualifying exigency arising out of a family member’s active duty service.”¹⁹⁵ Connecticut’s paid family military leave law became effective on January 1, 2022 and provides employees who have family members in the military with paid family leave and other

188. See Karin, *supra* note 30, at 56–57 (noting that many state and local laws were enacted after 9/11); see also Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 197, 266 (2019) (listing twelve states with specific military leave laws).

189. For instance, Washington has a specific Military Family Leave Act that aims to support military families and enables them to spend time together before deployment and during a service member’s leave from deployment. WASH. REV. CODE ANN. § 49.77.010 (LexisNexis 2022). Under Washington’s state law, the spouse of a military service member may take up to fifteen days of unpaid leave when the service member is deployed or called up to active duty during a period of military conflict. *Id.* § 49.77.030(1).

190. Karin, *supra* note 30, at 57.

191. *Id.* (discussing state law differences).

192. *Id.*

193. *Id.*

194. See George Wood, *Veterans Day: Going Beyond Giving a Day off*, JD SUPRA (Nov. 7, 2019), <https://www.jdsupra.com/legalnews/veterans-day-going-beyond-giving-a-day-72859/> [hereinafter *Veterans Day*].

195. *Id.* (discussing state USERRA laws); MASS. ANN. LAWS ch. 175M, § 2(a)(1) (LexisNexis 2022).

benefits.¹⁹⁶ These are just a few examples of states offering additional protections and benefits to the family members of military personnel.

C. Title VII

Although this Article focuses on family military caregiver issues primarily within the context of the ADA, USERRA, FMLA, and relevant state laws, family caregiver discrimination also falls within the context of Title VII of the Civil Rights Act of 1964.¹⁹⁷ This protection under Title VII is relevant for family military caregivers because the majority of these caregivers are military spouses who are women.¹⁹⁸ Title VII prohibits employment discrimination and retaliation based on race, sex, color, religion, or national origin.¹⁹⁹ Most often, the crux of a Title VII claim in the caregiver context is whether an employer discriminated against an employee because of sex stereotypes concerning the roles of mothers and fathers; however, parental status itself is not protected under federal law.²⁰⁰

In 2007, the EEOC issued an enforcement guidance regarding unlawful disparate treatment of workers with caregiving responsibilities.²⁰¹ The guidance recognizes that while the federal antidiscrimination laws do not expressly prohibit discrimination against caregivers, the EEOC will enforce Title VII's requirements in circumstances where discrimination against caregivers appears to be based on characteristics protected by the federal anti-discrimination statutes that it

196. Veterans Day, *supra* note 194; CONN. GEN. STAT. § 31-5111(a)(2)(F) (as amended by Connecticut SB 1 (2019)).

197. 42 U.S.C. §§ 2000e–e-17.

198. RAMCHAND ET AL., *supra* note 6, at 2; see WOMEN'S BUREAU, U.S. DEP'T OF LAB., MILITARY SPOUSES FACT SHEET, <https://www.dol.gov/sites/dolgov/files/WB/mib/WB-MilSpouse-factsheet.pdf>.

199. 42 U.S.C. § 2000e-2(a)(1).

200. See PETERSON-FISHER & LIU, *supra* note 133, at 7.

201. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities> [hereinafter UNLAWFUL DISPARATE TREATMENT].

enforces.²⁰² The EEOC caregiver guidance emphasizes the role of discriminatory stereotypes, including stereotyping based on an association with someone with a disability.²⁰³ For example, the guidance notes that it would be unlawful for an employer to refuse to hire an individual who is a single parent of a child with a disability based on the assumption that caregiving responsibilities will make the worker unreliable.²⁰⁴ The guidance provides several other examples of caregiver responsibilities that might implicate the statute's protections.²⁰⁵ For example, the guidance states that it is unlawful to fail to hire someone caring for a family member with a disability based on the assumption that those care duties would make the worker unreliable.²⁰⁶ The guidance also recognizes "hostile work environment claims on the basis of unlawful stereotypes, such as stereotypes of working mothers, pregnancy, or association with disabled individuals."²⁰⁷

In March 2022, the EEOC published a technical assistance document, "The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Law," and updated its COVID-19 "What You Should Know" technical assistance document explaining discrimination against applicants and employees with family caregiving responsibilities.²⁰⁸ These guidance documents provide several

202. *Id.*

203. *Id.*; see also *Why Care About Caregivers?*, *supra* note 98, at 375.

204. UNLAWFUL DISPARATE TREATMENT, *supra* note 201.

205. *Id.*

206. *Id.*

207. Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 31 (2009); see also UNLAWFUL DISPARATE TREATMENT, *supra* note 201.

208. See Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Releases Information About Employment Discrimination Against Caregivers* (Mar. 14, 2022), <https://www.eeoc.gov/newsroom/eeoc-releases-information-about-employment-discrimination-against-caregivers>; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2022-1, *THE COVID-19 PANDEMIC AND CAREGIVER DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS* (2022), <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment> [hereinafter *THE COVID-19 PANDEMIC AND CAREGIVER DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS*]; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP.

examples of what the EEOC considers to be unlawful discrimination based on pandemic-related caregiving responsibilities.²⁰⁹ One pandemic-related example of harassing conduct that may contribute to an unlawful hostile work environment includes “[i]nsulting Asian employees caring for family members with COVID-19 because COVID-19 was first identified in an Asian country.”²¹⁰ Another example includes “[q]uestioning, without merit, the professional dedication of employees caring for individuals with disabilities who are at higher risk of severe illness from COVID-19” and “mocking such employees on that basis for taking pandemic precautionary measures to avoid infection.”²¹¹ Some practitioners have noted that the “issuance of this guidance signals that the EEOC will be receptive to complaints of discrimination by individuals who believe that the demands of their caregiving responsibilities have influenced employers’ decisions about them, or who believe that they have been targets of harassment because of their caregiver responsibilities.”²¹²

D. USERRA

USERRA is a significant employment law protection germane to the military caregiver demographic. Enacted in 1994, USERRA is the latest in a series of veterans’ employment rights laws aimed at safeguarding the employment and

OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (July 12, 2022).

209. See THE COVID-19 PANDEMIC AND CAREGIVER DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, *supra* note 208; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 208.

210. THE COVID-19 PANDEMIC AND CAREGIVER DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, *supra* note 208.

211. *Id.*

212. Lauri F. Rasnick & Susan Gross Sholinsky, *A New Protected Class? Not Quite, but the EEOC Is Looking Out for Workers with Caregiving Obligations*, WORKFORCE BULL. (Mar. 21, 2022), <https://www.workforcebulletin.com/2022/03/21/a-new-protected-class-not-quite-but-the-eeoc-is-looking-out-for-workers-with-caregiving-obligations/>.

reemployment rights of veterans and members of the uniformed services.²¹³ USERRA has three express purposes:

(1) to encourage noncareer [military] service in the uniformed services by eliminating . . . disadvantages to civilian careers . . . which can result from such service; (2) to minimize the disruption to the lives of persons performing [military] service . . . their employers [and others] by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination [based on past, present, or future military service].²¹⁴

To accomplish its goals, USERRA provides reemployment protections and forbids discrimination and retaliation because of a service member's military service.²¹⁵ For example, an employer cannot refuse to hire someone due to its belief or assumption that he or she will regularly miss work to fulfill his or her National Guard obligations.²¹⁶ Moreover, USERRA imposes specific requirements on employers of returning service members with disabilities incurred or aggravated during their military service.²¹⁷ When employing a service member with a disability, USERRA's protections go well beyond the protections found in the ADA.²¹⁸ Most notably, USERRA defines "disability" more broadly and covers any disability incurred or aggravated during service whereas the

213. See 38 U.S.C. § 4301(a).

214. *Id.*; see also *Bradberry v. Jefferson Cnty., Tex.*, 732 F.3d 540, 544–45 (5th Cir. 2013).

215. § 4311(a); §§ 4312, 4313 (outlining reemployment protections).

216. See *Atteberry v. Avantair, Inc.*, No. 8:08-cv-01034-T-17EAJ, 2009 WL 1615519, at *1, *4 (M.D. Fla. June 9, 2009) (denying summary judgment to an employer that retracted a job offer after learning that a plaintiff had two more years of military service that would require him to miss work); *McLain v. City of Somerville*, 424 F. Supp. 2d 329, 333 (D. Mass. 2006) (holding that an employer violated USERRA when it failed to hire a serviceperson as a police officer because his discharge date made him unavailable for work until two months after the police academy began).

217. § 4313(a)(3).

218. *Richardson v. Wolf*, No. 1:17-cv-1588-EGS-ZMF, 2021 WL 3507741, at *15 (D.D.C. July 23, 2021) (noting that USERRA's disability protections are greater than those found in the ADA).

ADA's coverage of only those disabilities that meet the ADA's statutory definition of disability.²¹⁹ As such, a disability covered by USERRA is not subject to the ADA's requirement that the disability "substantially limits" one or more of the individual's major life activities.²²⁰ In other words, while a service member may not have a claim under the ADA, they would be entitled to all of USERRA's protections for those disabled during their military service if the military service caused or aggravated a disability.²²¹ USERRA requires employers to make reasonable efforts to accommodate a service member's disability and further requires employers to make reasonable efforts to help the disabled employee become qualified when the veteran remains unqualified to perform with accommodations.²²²

DOL's Veterans' Employment and Training Service (VETS) is the agency that investigates and resolves USERRA complaints.²²³ There are generally two options for a service member to assert their rights under USERRA.²²⁴ The first option is that a service member can file a complaint with VETS which will attempt to resolve it.²²⁵ If VETS is not successful with resolving the dispute, the complaint may be referred to the U.S. Department of Justice if the complaint involves a private, state, or local government employer.²²⁶ The second option is that a USERRA plaintiff can pursue a civil action directly in court.²²⁷ USERRA allows for a number of remedies such as equitable relief, lost wages and benefits, attorney's fees and costs, and

219. *Id.*; 38 U.S.C. § 4313(a)(3)(A); 42 U.S.C. § 12102(1).

220. Sharon M. Erwin, *When the Troops Come Home: Returning Reservists, Employers, and the Law*, 19 HEALTH LAW. 1, 10 (2007); 38 U.S.C. § 4313(a)(3)(A); 42 U.S.C. § 12102(1).

221. Erwin, *supra* note 220, at 10.

222. 38 U.S.C. § 4313(a)(3)(A). USERRA's regulations define reasonable efforts as "actions, including training provided by an employer that do not place an undue hardship on the employer." 20 C.F.R. § 1002.5(i).

223. 38 U.S.C. §§ 4321-4327.

224. *See* 20 C.F.R. § 1002.288.

225. *Id.* (explaining that a complaint may be filed with VETS either in writing, or electronically, and that a complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief).

226. *Id.* § 1002.291.

227. 38 U.S.C. § 4323(a)(3); 20 C.F.R. § 1002.288.

liquidated damages if the employer is willfully noncompliant.²²⁸

The principal reason USERRA is such a significant employment law protection for military caregivers is because the statute has unique protections and rights for military caregivers that are not afforded to them—or others—in any other federal employment antidiscrimination statute.²²⁹ Importantly, unlike many other federal employment statutes, USERRA applies to *all* public and private employers regardless of size as well as all employees who serve in the uniformed services, including past and present members of a uniformed service and those who have applied for membership.²³⁰ USERRA is also significant because it does not have a statute of limitations or exhaustion requirement or any other prerequisites to filing a lawsuit.²³¹ In addition to the inherent risks of litigation, employers face significant reputational harm when they are confronted with possible USERRA suits because the possibility of being perceived as discriminating against the military may negatively impact an employer's business, reputation, recruitment, and revenue.²³² Finally, the Supreme Court has long recognized that veterans' reemployment rights laws are employee-friendly and should be liberally construed

228. 38 U.S.C. § 4323(d)–(e), (h).

229. See Bradford J. Kelley, *For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA*, 127 PENN ST. L. REV. 57, 65–70 (2022).

230. 38 U.S.C. § 4303(4)(A) (broadly defining “employer” as an “entity that pays salary or wages for work performed or that has control over employment opportunities, including” an “entity to whom the employer has delegated the performance of employment-related responsibilities”); *Id.* § 4303(3), (13) (defining employee). USERRA’s definition of employee includes those who are part-time, temporary, seasonal, and even those on probationary status. 20 C.F.R. § 1002.41.

231. See 38 U.S.C. § 4327(b) (“[T]here shall be no limit on the period for filing the [USERRA] complaint or claim.”); *Id.* § 4323(a)(3); 20 C.F.R. §§ 1002.303, .311. Because there is no statute of limitations, “USERRA cases . . . carry significant exposure based on the accumulation of years of potential damages.” JASON RANJO & KURT PERHACH, MORGAN, LEWIS & BOCKIUS LLP, *WHAT EMPLOYERS STILL DON’T GET ABOUT BENEFITS FOR VETERANS 2* (2020), <https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2020/what-employers-still-dont-get-about-benefits-for-veterans.pdf>.

232. Kelley, *supra* note 229, at 61, 70.

in favor of the service member, making USERRA more protective than other employment discrimination statutes.²³³

USERRA protections would undoubtedly apply to military caregivers who are themselves veterans.²³⁴ However, some commentators have argued that USERRA does not offer any protection for military spouses if they are not military members or veterans.²³⁵ As a result, military caregivers, including military spouses, are largely excluded from USERRA's strong protections.²³⁶ Indeed, the legislative history indicates that Congress did not consider including military spouses in the USERRA's employment discrimination protections at the time the statute was enacted.²³⁷ One commentator explains that "while the stated purpose of the law seems to speak volumes about the importance of not punishing military service, the drafters did not seem to consider the equivalent punishment shouldered by military spouses."²³⁸ This reflects the traditional and common family structure when USERRA was passed: service members typically supported the household, while their spouses cared for children at home.²³⁹

Some federal courts have concluded that Congress did not intend USERRA to extend a service member's protections to others with a close association, including military spouses.²⁴⁰ For instance, in *Lourens v. Merit Systems Protection Board*, the

233. See, e.g., *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278 & 278 n.1, 285 (1946) (stating the Selective Training and Service Act of 1940 "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 216, 220 n.9 (1991) (stating the Veterans' Reemployment Rights Act is "to be construed in the beneficiaries' favor"); *Ala. Power Co. v. Davis*, 431 U.S. 581, 582-85 (1977) (stating the Military Selective Service Act of 1967 "is to be liberally construed for the benefit of those who . . . served[d] their country").

234. 38 U.S.C. § 4311(a).

235. Wellman, *supra* note 15, at 229-30.

236. *Id.* at 229.

237. *Id.*

238. *Id.* at 229-30.

239. *Id.* at 230.

240. *Id.* at 270; see, e.g., *Harden-Williams v. Agency for Int'l Dev.*, 469 Fed. Appx. 897, 899 n.2 (Fed. Cir. 2012) ("In any event, this court has already held that a widow of a military serviceman who has not herself served in a uniformed service is not entitled to the protections of USERRA.").

Federal Circuit held that “[i]f Congress desired [Section 4311(a)] to include spouses or widows [of those in uniformed service], an additional phrase in the statute would have done the job. That phrase is not there.”²⁴¹ In addition, the U.S. District Court for the Eastern District of Louisiana held that USERRA did not provide a legal remedy for the widow of a deceased service member by concluding that “[n]owhere in the plain text of the statute does the USERRA prohibit discrimination against a spouse of a service member by the spouse’s employer.”²⁴²

Though the purpose of USERRA emphasizes protecting military service, the burden on military spouses was not considered.²⁴³

As for state-level laws, USERRA sets a “floor, not a ceiling” of employment protections for service members and preempts state laws that offer less.²⁴⁴ Many states have enacted state-level laws to mirror USERRA.²⁴⁵ For instance, Washington State’s Veterans and Veterans’ Affairs statute mirrors USERRA and establishes certain rights and responsibilities under state law for uniformed service members and their civilian employers.²⁴⁶ Many state laws provide service members with more protections and rights than those found under USERRA.²⁴⁷ For

241. *Lourens v. Merit Sys. Prot. Bd.*, 193 F.3d 1369, 1371 (Fed. Cir. 1999); *Singleton v. Prudential Ins. Co. of Am.*, 105 F. Supp. 3d 627, 636 (E.D. La. 2015) (“Because the statute clearly limits anti-discrimination coverage to claimants who are service members or applicants, Mrs. Singleton’s claim against UPS falls outside the USERRA’s scope of protection.”).

242. *Singleton*, 105 F. Supp. 3d at 631–32, 635.

243. *Wellman*, *supra* note 15, at 229–30.

244. *See* 20 C.F.R. § 1002.7(a)–(b).

245. *See* John F. Beasley Jr. & Marisa Anne Pagnattaro, *Reemployment Rights for Noncareer Members of the Uniformed Services: Federal and State Law Protections*, 20 LAB. LAW. 155, 169 (2004) (noting that the range of protections varies significantly by state); *see also* Weston Williamson, *supra* note 188, at 203 (“Many of these laws bootstrap on the suite of substantive rights offered by federal law by extending USERRA protections to state service (service based on orders from a state governor, rather than the president), with or without adding in additional protection.”).

246. WASH. REV. CODE ANN. § 73.16.005 (LexisNexis 2022); *see also* Matt Crotty, *The Uniformed Services Employment and Reemployment Rights Act and Washington State’s Veteran’s Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination*, 43 GONZ. L. REV. 169, 179 (2007).

247. GEORGE WOOD, AM. BAR ASS’N, A GUIDE TO LEAVE UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT 1 (2014), https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/2b_wood.pdf.

example, in addition to the damages allowed under USERRA, Oklahoma's statute allows for actual, compensatory, and punitive damages.²⁴⁸ Some state laws provide for criminal penalties.²⁴⁹ For example, Virginia's law provides that an employer that violates the law is guilty of a misdemeanor and may be fined or imprisoned up to thirty days, or both.²⁵⁰ In recent years, a growing number of states have enacted legislation to provide "additional leave benefits for employees who are veterans and active military members."²⁵¹

E. *Vietnam Era Veterans' Readjustment Assistance Act*
(VEVRAA)

The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) gives available employment law protections to military caregivers employed by federal contractors.²⁵² VEVRAA, which is enforced by DOL's Office of Federal Contract Compliance Programs (OFCCP), was originally passed in 1974 to help returning Vietnam veterans and protect them from employment discrimination.²⁵³ VEVRAA prohibits federal contractors and subcontractors from discriminating in employment against protected veterans and requires employers take affirmative action to recruit, hire, promote, and

248. OKLA. STAT. ANN. tit. 44, § 4323(D); 38 U.S.C. § 4324(d)-(e), (h).

249. See, e.g., VA. CODE ANN. § 44-98 ("A person who . . . deprives a member of the Virginia National Guard or Virginia Defense Force of his employment, or prevents . . . such member being employed, or obstructs or annoys such member or his employer at his trade, business, or employment, . . . or dissuades any person from enlistment . . . shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not exceeding \$500, or imprisonment in jail not more than 30 days, or shall suffer both fine and imprisonment.").

250. *Id.*

251. *Veterans Day*, *supra* note 194.

252. See 38 U.S.C. § 4212.

253. See *id.*; *Military Spouses Frequently Asked Questions*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/ofccp/faqs/military-spouses> (Nov. 8, 2019). VEVRAA applies to employers that have federal contracts or subcontracts of \$100,000 or more. 38 U.S.C. § 4212. OFCCP is the agency that enforces the non-discrimination and affirmative action requirements of federal contracts and subcontractors to the federal government. *Military Spouses Frequently Asked Questions*, *supra*. OFCCP investigates reported incidents of discriminatory practices by federal contractors and subcontractors. *Id.*; 42 C.F.R. § 60-300.60 (2014).

retain these individuals.²⁵⁴ Significantly, OFCCP's regulations implementing VEVRAA make it unlawful for a federal contractor to discriminate in employment against a qualified individual because that individual "is known to have a family, business, social or other relationship or association" with a protected veteran.²⁵⁵ This protection therefore extends to spouses and other family members of protected veterans.²⁵⁶ In 2019, OFCCP issued a directive to ensure VEVRAA is applied to spouses of protected veterans and to provide guidance to aid contractors in supporting the families or protected veterans.²⁵⁷

However, VEVRAA protections are quite limited, chiefly because the protections only apply to federal contractor employers.²⁵⁸ Further, there is no private right of action under VEVRAA; any action must be brought by DOL.²⁵⁹ With that said, some practitioners have noted OFCCP's actions in recent years signal a more rigorous investigative and enforcement landscape for military service members who work for federal contractors.²⁶⁰

F. *Other State Law Protections*

State law protections for military caregivers are another important consideration. Family military caregivers should be aware of these state laws for the additional employment protections they provide. These protections, which may cover

254. See 38 U.S.C. § 4212.

255. 41 C.F.R. § 60-300.2.

256. See *id.* § 60-300.21(e) ("It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known protected veteran or pre-JVA veteran status of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.").

257. CRAIG E. LEEN, U.S. DEP'T OF LAB: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, DIRECTIVE (DIR) 2020-01 (2019), <https://www.dol.gov/agencies/ofccp/directives/2020-01>.

258. See 38 U.S.C. § 4212.

259. See *Ledbetter v. City of Topeka*, 112 F. Supp. 2d 1239, 1241-42 (D. Kan. 2000) (collecting cases throughout the country concluding that VEVRAA does not include a private right of action).

260. See, e.g., Richard Oehler & Christopher Wilkinson, *OFCCP Signals More Rigorous Enforcement Landscape with Three Big Moves*, JD SUPRA (Sept. 9, 2021), <https://www.jdsupra.com/legalnews/ofccp-signals-more-rigorous-enforcement-1188110/>.

family military caregivers, will help these individuals continue to provide the necessary care for service members. A growing number of states have family responsibilities discrimination or specific military family leave laws that prohibit employers from discriminating against employees because they provide care to family members.²⁶¹ This is especially important since it provides potential plaintiffs with the option of filing a suit in state rather than federal court or by including state claims in a federal case.²⁶²

Some states have enacted laws with broader protections that may provide additional employment protections for family military caregivers. For instance, Alaska prohibits discrimination because of “marital status, changes in marital status, pregnancy or parenthood.”²⁶³ Under Connecticut state law, an employer may not request or require information from an applicant or employee concerning the individual’s familial responsibilities.²⁶⁴ Delaware law prohibits discrimination “because of the individual’s family responsibilities, except with respect to the employer’s attendance and absenteeism standards that are not protected by other applicable law and inasmuch as the employee’s performance at work meets satisfactory standards.”²⁶⁵ These additional protected characteristics and prohibitions under state law are beneficial for military caregivers, particularly when federal law does not directly protect those characteristics.²⁶⁶

261. THE CTR. FOR WORKLIFE L., UNIV. OF CAL. HASTINGS COLL. OF THE L., STATE AND LOCAL FRD LAWS PROHIBITING EMPLOYMENT DISCRIMINATION AGAINST PARENTS AND OTHER CAREGIVERS 1 (2021), <https://worklifelaw.org/wp-content/uploads/2021/10/State-and-Local-FRD-Law-Table.pdf>.

262. *Id.* at 2–30.

263. ALASKA STAT. § 18.80.200(b) (2022).

264. CONN. GEN. STAT. ANN. § 46a-60(b)(9) (West 2022).

265. DEL. CODE ANN. tit. 19, § 711(l)(1)(a) (2022). Delaware law also “does not create any obligation for an employer to make special accommodations for an employee with family responsibilities, so long as all policies related to leave, scheduling, absenteeism, work performance, and benefits are applied in a nondiscriminatory manner.” *Id.* § 711(l)(2).

266. See PETERSON-FISHER & LIU, *supra* note 133, at 1.

Moreover, several states have broadened associational discrimination protections to include association with other protected classes that could also provide additional protections for military family caregivers.²⁶⁷ Most notably, California's FEHA law extends associational discrimination protection to race, religion, color, national origin, ancestry, physical and mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, and veteran or military status if it "includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."²⁶⁸ However, the contours of FEHA are still unresolved in California, and associational discrimination cases in the state are rare—those that are brought are seldomly litigated to final judgment.²⁶⁹

G. Local Protections

A number of cities or localities have afforded caregiver protections as well. Local laws are frequently seen as increasingly important since they often cover businesses that are too small for federal statutory coverage.²⁷⁰ These laws are also notable for family military caregivers who work for these businesses and in these jurisdictions.²⁷¹ The local laws vary widely with respect to how they define employer, whether a

267. See, e.g., ME. REV. STAT. tit. 5, § 4553(1-D) (2019). Under the Maine Human Rights Act, the definition of an "aggrieved person" covers "any person who claims to have been subject to unlawful discrimination on the basis of protected class status, including discrimination based on the person's known relationship or association with a member of a protected class and discrimination on the basis of perceived protected class status." *Id.* Protected classes include "race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry, national origin or familial status." *Id.* § 4572(1)(A).

268. CAL. GOV'T CODE § 12926(o) (Deering 2022).

269. See, e.g., *Vega v. YapStone, Inc.*, No. A160884, 2021 Cal. App. Unpub. LEXIS 4311, at *11–12, 30 (Cal. Ct. App. June 30, 2021) (affirming the trial court's decision dismissing an associational disability bias claim because the employer showed nondiscriminatory reasons for the discharge).

270. Wiggan, *supra* note 187, at 171 (noting that local laws cover two-thirds of businesses too small to receive federal statutory protection).

271. *Id.*

private right of action is available, and the available remedies.²⁷² As a consequence, a business operating in multiple locations throughout a state often finds it onerous to comply with the various requirements.²⁷³ One notable example of a local law is the D.C. Human Rights Act that prohibits discrimination based on “family responsibilities” which the Act defines as “the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship.”²⁷⁴ Courts have historically struggled with such fluid definitions and have been reluctant to give these laws a broad reading.²⁷⁵

III. BEST PRACTICES FOR EMPLOYERS

This Part makes several recommendations to employers regarding best practices for recruiting and retaining military caregivers, managing the impacts of employee leave and family caregiving responsibilities to reduce discrimination and litigation, and revising personnel policies and practices maximize the benefits employing military caregivers.

A. EEOC Best Practices for Caregivers

In 2009, the EEOC issued a technical assistance document, *Employer Best Practices for Workers with Caregiving Responsibilities*, which provided employers with useful information regarding recruitment, hiring, and retaining

272. *Id.* at 172.

273. *Id.*

274. D.C. CODE § 2-1401.02(12) (2022); *see, e.g.*, *Russom v. 1Life Healthcare*, No. 21-2868 (JEB), 2021 U.S. Dist. LEXIS 218681, at *9–11 (D. D.C. Nov. 12, 2021) (analyzing a case of discrimination based on family responsibilities).

275. For example, in *Simpson v. D.C. Office of Human Rights*, the court sharply criticized the contours (or lack thereof) found in the D.C. Human Rights Act by contending that “[t]he statute does not reveal whether the family responsibilities must rise to the level of a legal duty (*e.g.*, to pay child support) or whether a moral obligation to care for an ill parent is sufficient.” 597 A.2d 392, 404–05 (D.C. 1991). The *Simpson* court also noted that the Act “contains no explicit requirement that an employer accommodate an employee’s working schedule so that the employee can discharge his or her ‘family responsibilities.’” *Id.* at 405.

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caregivers.²⁷⁶ Employers may exercise their own discretion regarding these best practices because they “are proactive measures that go beyond federal non-discrimination requirements.”²⁷⁷ One practitioner commented that “[i]mplementing some or all of them, however, will help prevent claims that an employer discriminates against caregivers in a way that violates Title VII, the ADA, or other federal employment laws.”²⁷⁸

The EEOC’s technical assistance document initially outlined general suggestions for employers.²⁷⁹ These suggestions included training managers about their legal obligations as well as developing and enforcing a strong equal employment opportunity policy that describes common stereotypes and prohibited conduct against workers with caregiving responsibilities.²⁸⁰ According to the EEOC, employers can develop recruitment practices that target caregivers who are looking to enter or return to the workplace.²⁸¹ To address recruitment, hiring, and promotion, the EEOC recommended focusing on an applicant’s or employee’s specific job qualifications instead of asking about caregiving-related issues during interviews or performance reviews.²⁸² The EEOC also encouraged employers to focus on an applicant’s or employee’s total work experience and accomplishments when making hiring and promotion decisions.²⁸³ This would help employers more fairly evaluate workers with caregiving responsibilities

276. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2009-1, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009), <https://www.eeoc.gov/policy/docs/caregiver-best-practices.html> [hereinafter EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES].

277. *Id.*

278. Vanessa R. Waldref, *EEOC Lists Employer Best Practices for Supporting Caregiver Employees*, EMP. L. COMMENT., May 2009, at 1, 3.

279. EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES, *supra* note 276.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

who may have gaps in their work history.²⁸⁴ The guidance reminded employers to consider allowing employees to have flexible work schedules and offer reasonable personal or sick leave for all employees to engage in caregiving even if they are not obligated to provide this under the FMLA.²⁸⁵ The guidance points out that flexible work policies positively affect employee engagement as well as a business's efficiency, efficacy, and profitability.²⁸⁶ The EEOC also encouraged employers to provide training to "[d]evelop the potential of all employees, supervisors, and executives," including those with caregiving responsibilities.²⁸⁷

Other federal agencies have issued similar best practices that echo many of the points raised in the EEOC's best practices. For instance, OFCCP's *Best Practices for Ensuring Equal Opportunity in Promotions* stresses that contractors who provide caregiver leave should communicate promotion opportunities to all employees regardless of their caregiving responsibilities.²⁸⁸

B. RAISE Family Caregivers Act Initial Report to Congress

In 2018, the Recognize, Assist, Include, Support, & Engage (RAISE) Family Caregivers Act became law.²⁸⁹ The law directed the Secretary of Health and Human Services to develop a national family caregiving strategy to specifically identify actions that communities, providers, government, and others are taking and may take to recognize and support family caregivers.²⁹⁰ The law established the Family Caregiving

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Best Practices for Ensuring Equal Opportunity in Promotions*, U.S. DEP'T OF LAB.: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/focused-reviews/promotions/best-practices> (last visited Mar. 26, 2023).

289. Recognize, Assist, Include, Support, and Engage (RAISE) Family Caregivers Act, Pub. L. No. 115-119, §§ 1-6, 132 Stat. 23 (2018).

290. *Id.*; see also Aviv S. Bliwas, *Why We Are Failing Family Caregivers*, 17 NAT'L ACAD. OF ELDER L. ATT'YS J. 13, 21-22 (2021) (describing the RAISE Family Caregivers Act and its history and goals).

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Advisory Council to carry out this mission.²⁹¹ The Council's initial report to Congress in 2021 provided "a comprehensive review of the current state of family caregiving and [outlined twenty-six] recommendations for how the federal government, states, tribes, territories, and communities" could effectively partner with the private sector to better recognize and support family caregivers.²⁹² Specifically, the Council sought to promote work-life balance and increase employee retention by recommending more flexible, employee-centered policies.²⁹³ In 2022, the Family Caregiving Advisory Council and the Advisory Council to Support Grandparents Raising Grandchildren partnered to develop the National Strategy to Support Family Caregivers.²⁹⁴ This National Strategy includes proposed actions that a multitude of stakeholders may take to support caregivers.²⁹⁵ The Councils will publish the first update to the National Strategy in 2024.²⁹⁶

291. RAISE Family Caregivers Act §§ 1–6; Bliwas, *supra* note 290, at 22.

This advisory council is required to meet at least quarterly for the first year and at least three times a year thereafter. The advisory council is also required to issue an annual report each year "concerning the development, maintenance, and updating of the Strategy, including a description of the outcomes of the recommendations and any priorities included in the initial report."

Bliwas, *supra* note 290, at 22.

292. RAISE Family Caregivers Act Initial Report to Congress, ADMIN. FOR CMTY. LIVING, <https://acl.gov/RAISE/report> (Nov. 18, 2021).

293. RAISE FAM. CAREGIVING ADVISORY COUNCIL, ADMIN. FOR CMTY LIVING, RECOGNIZE ASSIST, INCLUDE, SUPPORT, & ENGAGE (RAISE) FAMILY CAREGIVERS ACT INITIAL REPORT TO CONGRESS 1, 11 (2021), https://acl.gov/sites/default/files/RAISE-InitialReportToCongress2021_Final.pdf.

294. RAISE ACT FAM. CAREGIVING ADVISORY COUNCIL & ADVISORY COUNCIL TO SUPPORT GRANDPARENTS RAISING GRANDCHILDREN, ADMIN. FOR CMTY LIVING, 2022 NATIONAL STRATEGY TO SUPPORT FAMILY CAREGIVERS 1, 3 (2022), https://acl.gov/sites/default/files/RAISE_SGRG/NatlStrategyToSupportFamilyCaregivers.pdf.

295. *Id.* at 3, 24–28.

296. *Id.* at 15.

*C. Military and Veteran Caregiver Employment Taskforce
Practical Guide for Employers*

The Military and Veteran Caregiver Employment Taskforce meeting, held in June 2019, included attendance from private and public sector organizations as well as AARP, the Elizabeth Dole Foundation, and the U.S. Chamber of Commerce Foundation's Hiring Our Heroes Program.²⁹⁷ The group articulated numerous strategies to enhance veteran caregiver employment, including flexible schedules, remote opportunities, expanding leave, customized benefits, employee assistance programs, resource groups, and support from peers and leaders.²⁹⁸ They encouraged employers to eliminate false stereotypes suggesting that caregiving employees are less committed to their jobs, especially if they participate in flexible work arrangements.²⁹⁹ The group recommended that employers take steps to ensure direct managers understand the particular situations and challenges of their caregiving employees and regularly communicate with those employees.³⁰⁰ They encouraged employers to consider starting programs and training to better understand the responsibilities of caregivers, establish mentoring relationships to help caregiving employees navigate the workplace, and implement protocols to guarantee caregiver policies and accommodations continue even when direct managers change.³⁰¹ Protocols may include maintaining hiring agreements and documenting the accommodations made for military caregivers.³⁰² One senior manager recommended that employers create internship or

297. SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE, *supra* note 11, at 2.

298. *Id.* (explaining that these ideas were "identified as a significant step for employers to take in order to embrace and support working family military caregivers").

299. *Id.* at 13 (acknowledging the important role of employers in dispelling false assumptions and stereotypes).

300. *Id.* at 17.

301. *Id.* at 19. These strategies contribute to creating a culture of awareness concerning the needs of military caregivers.

302. *Id.* at 20.

apprenticeship programs for military caregivers looking to re-enter the workforce although they may have large gaps in their résumés.³⁰³ The group also suggested that employers may consider providing additional resources such as employee handbooks and resource guides for military caregivers, onboarding ambassadors, and human resources liaisons.³⁰⁴

The group provided several specific recommendations on how employers can more successfully recruit military caregivers.³⁰⁵ These included “identify[ing] as a military caregiver-friendly organization in job announcements,” “creating a social impact campaign around . . . caregiver needs, accommodations and opportunities,” hosting career fairs that target caregivers, and initiating a pledge program to hire military caregivers.³⁰⁶ Regarding onboarding, employers can train caregiving ambassadors to promote how the organization fosters a caregiving-friendly workplace.³⁰⁷ Employers can also partner with entities that provide free counseling and policy education.³⁰⁸ The group encouraged employers to retain military caregivers by promoting employee resource groups, creating a rotation program where caregiving employees can obtain experience in a variety of roles, and partnering with other employers to advocate for caregivers in the workplace.³⁰⁹

D. *Employee Handbook Considerations*

A number of groups stress that employers should revisit and revise their employee handbooks. For example, the Center for WorkLife Law, an advocacy and research organization at

303. *Id.* at 22–23.

304. *Id.* at 26.

305. *Id.* at 28.

306. *Id.* The report notes that participants in the Military and Veteran Caregiver Employment Taskforce were challenged “to think outside the box in considering initiatives, activities and services employers might implement to recruit, hire and retain valued caregiver employees” beyond the traditional workplace best practices and policies. *Id.*

307. *Id.* at 29.

308. *Id.*

309. *Id.*

University of California Hastings Law School, published a model policy for employers.³¹⁰ The model policy recommends a few options for employers to consider.³¹¹ In particular, one example recommends that employers consider adding a stand-alone policy prohibiting family responsibilities discrimination.³¹² A stand-alone policy communicates to employees the company's commitment to avoiding this type of discrimination and allows employers to more clearly explain what family responsibilities discrimination entails to employees and supervisors.³¹³ In one example, the policy would articulate the company's "essential business objective . . . to recruit and retain" excellent, productive employees.³¹⁴ In addition, the policy would remind employees of their obligations to perform their job duties under the performance objectives and to comply with the company's attendance policy.³¹⁵ Employers can further strengthen their caregiver discrimination policies by adopting the EEOC's recommendation to describe several examples of common stereotypes and prohibited conduct.³¹⁶

IV. SUGGESTIONS TO STRENGTHEN EMPLOYMENT LAW PROTECTIONS

There are several recommendations that may help ensure that military caregivers are adequately protected by the law. The first, most obvious solution regarding USERRA is a legislative solution to amend the statute so that family caregivers of

310. *Our Mission*, WORKLIFE L., <https://worklifelaw.org> (last visited Jan. 13, 2023); THE CTR. FOR WORKLIFE L., PREVENTING DISCRIMINATION AGAINST EMPLOYEES WITH FAMILY RESPONSIBILITIES: A MODEL POLICY FOR EMPLOYERS 1–2 https://worklifelaw.org/publications/Model_Policy_for_Employers.pdf.

311. *Id.* at 2–4.

312. *Id.* at 3.

313. *Id.*

314. *Id.* (referencing Approach No. 2, Example B of the model policy).

315. *Id.*

316. EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES, *supra* note 276.

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military service members are covered. This could also be accomplished by adding an association provision to USERRA similar to the association provision contained in the ADA. State action should also be considered. This Part offers some potential steps to improve the situation.

A. Amending USERRA

Perhaps the most effective solution to help protect family military caregivers is to amend USERRA to include these caregivers within the law's discrimination protections.³¹⁷ The logic and framework of the existing statute supports including military caregivers because Congress states that the law was deliberately designed "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."³¹⁸ Equally important, USERRA's express purpose is "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities."³¹⁹ The employment challenges that service members experience are directly levied on their family caregivers.³²⁰ For these reasons, USERRA Section 4311 should be amended to specifically define family caregivers as any employee with primary caretaking responsibilities for a service member entitled to USERRA protections. The definition of military family caregiver can be the same definition used in the FMLA's military caregiver leave.³²¹

Additionally, USERRA should be amended to include a comparable association provision like the one found in the

317. Wellman, *supra* note 15, at 268 (advocating for the inclusion of military spouses within USERRA'S discrimination protections).

318. Employment and Reemployment Rights of Members of the Uniformed Services Act, 38 U.S.C. § 4301(a)(1).

319. *Id.* § 4301(a)(2) (emphasis added).

320. *See supra* Section I.A.

321. 29 C.F.R. § 825.127 (2022); *see* discussion *supra* Section II.B.1.

ADA.³²² One commentator noted that “[t]he ADA’s provision was designed to combat the same type of discrimination by association faced by military spouses by virtue of their relationship with service members. Although the same provision does not exist under USERRA, military spouses may make an analogous argument in support of amending USERRA.”³²³ Revising USERRA to incorporate the same association provision found in the ADA comports with the intent of USERRA by protecting military family caregivers and recognizing the realities of the grave national security issues at stake.³²⁴

Ultimately, a legislative amendment to USERRA may be the best way to address the problem because of the wide-ranging protections that would become available for military caregivers under the statute. As discussed earlier, USERRA has unique protections and rights not found in other employment protection statutes, including providing broader coverage and protections than laws like the FMLA and ADA.³²⁵ In particular, USERRA applies to all employers regardless of size, even those with only one employee, and to federal and state governments.³²⁶ Also, USERRA does not have a statute of limitations or exhaustion requirement and allows the recovery of attorney fees and liquidated damages for willful violations.³²⁷ The absence of an exhaustion requirement means that a USERRA plaintiff can file a lawsuit without following the time-consuming administrative process of filing with an agency.³²⁸ As such, obtaining relief for USERRA violations moves at a faster pace than other employment discrimination statutes. Furthermore, because USERRA litigation often

322. See Americans with Disabilities Act, 42 U.S.C. § 12112(b)(4).

323. Wellman, *supra* note 15, at 269–70.

324. See 38 U.S.C. § 4301(a).

325. See Erwin, *supra* note 220 at 1, 10 (arguing that USERRA’s disability protections are greater than those found in the ADA); discussion *supra* Sections II.A–B, .D.

326. 20 C.F.R. § 1002.34(a) (2022).

327. *Id.* §§ 1002.303, .310–.312; 5 C.F.R. § 1208.11 (2022); 38 U.S.C. § 4323(a)(3).

328. 38 U.S.C. § 4323(a)(3); 20 C.F.R. § 1002.303.

involves a common question of pure law, USERRA claims are considered a leading candidate for class action treatment.³²⁹ Besides the significant litigation consequences, employers confronted with potential USERRA claims also face potential reputational harm due to the public's unprecedented support for veterans and military caregivers.³³⁰ In other words, USERRA is an employment discrimination statute on steroids that could uniquely benefit military caregivers.

Moreover, USERRA amendments have historically received widespread bipartisan support. For instance, a USERRA amendment that established the same standard for hostile environment claims because of military status as that governing other employment discrimination laws received a unanimous vote in Congress and was signed into law by President Obama in 2011.³³¹ Ultimately, a legislative amendment would be a way for Congress to make a strongly pro-veteran and pro-military family statement after the longest period of warfare in the nation's history.

At the end of the day, amending USERRA to explicitly provide employment law protections for military caregivers could help address the recruitment and retention concerns as well. The Supreme Court has long recognized that service members' employment protections "provide[] the mechanism for manning the Armed Forces of the United States."³³² If younger generations see that veterans receive the proper care with active family involvement, more individuals will likely be open to serving in the military.

329. See, e.g., *Huntsman v. Sw. Airlines Co.*, No. 19-cv-00083 (PJH), 2019 U.S. Dist. LEXIS 121015, at *6, *13–15 (N.D. Cal. Feb. 3, 2021) (certifying a class of nearly 7,000 Southwest Airlines workers in a suit accusing the airline of failing to pay employees who take short-term military leave—despite doing so for other types of leave—and concluding plaintiffs' claims are common to the class, which includes pilots, flight attendants, ramp agents, and other airline employees).

330. See RANJO & PERHACH, *supra* note 231, at 2.

331. See Matthew F. Nieman, *New Law Expands USERRA to Recognize Hostile Environment Claims*, JACKSON LEWIS P.C. (Nov. 22, 2011), <https://www.jacksonlewis.com/resources-publication/new-law-expands-userra-recognize-hostile-environment-claims>.

332. *Ala. Power Co. v. Davis*, 431 U.S. 581, 583 (1977).

B. *Tax Relief and Incentives for Employers*

Another Congressional solution to consider is providing employers with a business tax credit to compensate employers for costs resulting from the employment of caregivers of service members.³³³ Generally, the employer's most common complaint is "loss of efficiency and production due to frequent and extended military service" and related absences.³³⁴ As such, this solution would allow employers to mitigate their losses by providing tax relief, thereby providing employers with some economic incentives and generating goodwill among employers to willingly hire and retain those employees serving as caregivers for military members.³³⁵

Fortunately, Congress is already considering tax incentive legislation. Specifically, the Credit for Caring Act of 2021, which was introduced in both the House and Senate, aims to alleviate some of the financial burden on families by creating a federal tax credit of up to \$5,000 to help eligible family caregivers address some of their out-of-pocket caregiving challenges.³³⁶ This legislation has limited bipartisan support; the AARP, Blue Star Families, Elizabeth Dole Foundation, Alzheimer's Association, the National Association of Area Agencies on Aging, and nearly three dozen other veteran and military family service organizations support the legislation.³³⁷ According to a recent study, eight in ten voters ages fifty and older support a tax credit for family caregivers.³³⁸

Comparable, and indeed superior, measures already exist at the state level. For example, New Jersey's Wounded Warrior

333. See Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 341 (2007).

334. *Id.*

335. *Id.*

336. Credit for Caring Act of 2021, H.R. 3321, 117th Cong. § 2(a) (2021); S. 1670, 117th Cong. § 2(a) (2021); see also Kerr, *supra* note 53.

337. See Jenkins & Roth-Douquet, *supra* note 186; see also Kerr, *supra* note 53.

338. Dena Bunis, *AARP Poll Reveals Strong Family Caregiver Tax Credit Support*, AARP (Aug. 20, 2021), <https://www.aarp.org/caregiving/home-care/info-2021/caregiver-tax-credit-poll.html>.

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Caregivers Relief Act provides a tax credit to qualified family caregivers who take care of a service member who has a disability from service in any war or conflict on or after 9/11.³³⁹ The law allows for two or more family caregivers to qualify for the veteran care credit for the same armed service member; the amount of the credit is allocated in proportion to each qualified family caregiver's share of total care expenses provided for the taxable year.³⁴⁰ Ultimately, New Jersey's Wounded Warrior Caregivers Relief Act should serve as a model for future federal legislation since it specifically addresses the military caregiver demographic and is more thorough legislation by accounting for a situation of two or more possible caregivers, for example.

C. Federal and State Agencies Should Engage in Outreach and Put Forth More Guidance

First and foremost, more guidance should be issued by federal and state agencies. As one scholar notes, the recent wars and the significant number of military members reintegrating to civilian life means that agencies must "remain vigilant in updating regulations and agency interpretations."³⁴¹ Targeted outreach is critically important to ensure that veterans and their families, including family caregivers, know about legal protections and how to seek enforcement.³⁴² An EEOC commissioner echoed this position, arguing that "it is imperative that federal and state agencies engage in targeted outreach to ensure that veterans and employers know about these particular laws and how they apply."³⁴³ This is especially

339. N.J. STAT. ANN. §§ 54A:4-14 to -15 (West 2022). Under the law, the credit is equal to 100% of the service member's disability compensation, or \$675, whichever is less. *Id.*

340. *Id.* § 54A:4-15(b).

341. Karin & Onachila, *supra* note 80, at 180.

342. See Bradford J. Kelley, *Veterans Employment Discrimination Guidance Updated*, MIL. TIMES (Feb. 3, 2021), <https://www.militarytimes.com/opinion/commentary/2021/02/03/veterans-employment-discrimination-guidance-updated/> (stressing "the importance of engaging in targeted outreach to ensure that veterans know about these laws and how to seek enforcement") [hereinafter *Veterans Employment Discrimination Guidance Updated*].

343. Sonderling, *supra* note 2; see also *Veterans Employment Discrimination Guidance Updated*, *supra* note 342 (emphasizing the importance of targeted outreach).

important for the military caregiver demographic because many veteran and military care providers do not call themselves “caregivers.”³⁴⁴ As a result, these “hidden heroes” oftentimes do not access the resources and services available to them even though a significant number of them describe being “exceedingly burdened” by their caregiving obligations.³⁴⁵

1. *Current guidance should be updated and revised*

The EEOC should update and substantively revise its current guidance. Any future guidance should also be voted on by the full EEOC and be subject to the full administrative law process, including notice-and-comment and publication in the Federal Register.³⁴⁶ The administrative law process, particularly through the submission of public comments, can surely help improve the regulatory process by providing outside parties, including military support organizations, trade associations, employers, unions, and others, the opportunity to provide meaningful feedback.

Surprisingly, the EEOC has not substantively updated its caregiver discrimination guidance since it was first issued in 2007.³⁴⁷ Equally puzzling, the EEOC has not updated its *Questions & Answers: Association Provision of the ADA* document since it was issued in 2005.³⁴⁸ The fact that these two documents

344. STRONG ET AL., *supra* note 12, at 7.

345. See Jenkins & Roth-Douquet, *supra* note 186.

346. See 29 C.F.R. § 1695.2(d) (2022) (“If the guidance document sets forth the Commission’s position on a legal principle for the first time or changes the Commission’s legal position on any issue, the Commission must approve the guidance document by majority vote.”); see also Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIAMI L. REV. 1, 42 (2022) (highlighting the drawbacks of guidance that was not subject to notice and comment as well as the likelihood of federal courts enjoining such guidance).

347. See *Questions and Answers About EEOC’s Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/questions-and-answers-about-eeocs-enforcement-guidance-unlawful-disparate-treatment-workers> (last visited Mar. 27, 2023) (“This document was issued prior to enactment of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which took effect on January 1, 2009.”).

348. See *QUESTIONS & ANSWERS: ASSOCIATION PROVISION OF THE ADA*, *supra* note 110.

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have not been updated is particularly concerning since the ADA Amendments Act of 2008 significantly changed the disability discrimination legal landscape.³⁴⁹ Before the ADA Amendments Act of 2008, courts used a very strict and narrow interpretation of the definition of disability, and the amendments ushered in a legal transformation.³⁵⁰ In fact, the EEOC's current caregiver guidance includes a specific notice on its website that the document was issued prior to the enactment of the ADA amendments.³⁵¹ However, the EEOC's *Questions & Answers: Association Provision of the ADA* issued in 2005 does not include the same notice.³⁵² Accordingly, the guidance should be revised to account for the new ADA case law. The guidance should note that courts recognize three theories of ADA associational discrimination (i.e., expense; disability by association; and distraction), and the guidance should be revised to align with the case law.³⁵³ For example, the guidance should reflect the fact that even though certain relationships may be protected by the association provision, courts have consistently "found that casual associations with disabled individuals are not protected."³⁵⁴ Ultimately, the caregiver guidance should be updated and revised to specifically account for military caregivers, especially since this is the fastest growing demographic of caregivers.³⁵⁵ The guidance should also include specific references to the FMLA and USERRA given the significant overlap involved.³⁵⁶

349. See Hart Edwards & Martin, *supra* note 101 ("The ADAAA sends an unmistakable message to the courts that the concept of disability is to be more broadly, rather than narrowly, construed.").

350. *Id.*

351. *Questions and Answers About EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra* note 347.

352. QUESTIONS & ANSWERS: ASSOCIATION PROVISION OF THE ADA, *supra* note 110.

353. See *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 487 (6th Cir. 2011).

354. Koepke, *supra* note 19, at 52.

355. See SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE, *supra* note 11, at 4.

356. See *supra* Sections II.A–B, .D.

Likewise, the EEOC's veterans discrimination guidance issued in late 2020 should be updated and revised to specifically account for military caregiver protections.³⁵⁷ Surprisingly, the current guidance fails to account for such discrimination even though the guidance emphasizes the shockingly high rate of post-9/11 veterans with disabilities.³⁵⁸ Importantly, the EEOC's veterans discrimination guidance currently makes no mention of the ADA's association provision.³⁵⁹ Furthermore, the current guidance does not mention the strong anti-retaliation provisions under both the ADA and USERRA.³⁶⁰ Moreover, the current guidance only contains a brief mention of ADA harassment, without a substantive discussion, and includes no mention of USERRA harassment protections.³⁶¹ Additionally, the EEOC should also update and revise its best practices guidance regarding caregivers to account for the unique challenges affecting military caregivers.³⁶²

2. *Opinion letters*

Federal agencies should also prioritize issuing more guidance to the public in other ways. One option to issue guidance more efficiently and effectively would be for federal agencies to prioritize issuing opinion letters. An opinion letter is an agency's official opinion on the application of a statute, its implementing regulations, and related case law to a specific

357. See *Veterans Employment Discrimination Guidance Updated*, *supra* note 342; see also U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2020-4, VETERANS AND THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR EMPLOYERS (2020), <https://www.eeoc.gov/laws/guidance/veterans-and-americans-disabilities-act-guide-employers> [hereinafter VETERANS AND THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR EMPLOYERS] (discussing how the ADA applies to veterans with disabilities but not accounting for military caregivers).

358. See *Veterans Employment Discrimination Guidance Updated*, *supra* note 342; VETERANS AND THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR EMPLOYERS, *supra* note 357.

359. UNDERSTANDING YOUR EMPLOYMENT RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR VETERANS, *supra* note 36.

360. *Id.*

361. *Id.*

362. See EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES, *supra* note 276; see also Jenkins & Roth-Douquet, *supra* note 186.

factual situation presented by one requesting the opinion.³⁶³ Opinion letters have provided valuable guidance for courts, employers, employees, unions, trade groups, practitioners, advocacy groups, and the general public.³⁶⁴ Many labor and employment agencies, including WHD, EEOC, and OFCCP, issue opinion letters.³⁶⁵

Opinion letters may be particularly helpful with providing additional clarity regarding the increasingly important interplay of protections under the ADA, the FMLA, and USERRA.³⁶⁶ One useful opinion letter request can ask whether a military caregiver who needs to attend healthcare meetings addressing the special medical needs of their service member spouse who has serious health conditions is a qualifying reason for taking intermittent FMLA leave.³⁶⁷ Another useful opinion letter request could seek clarity regarding whether USERRA authorizes claims arising out of discrimination for service-connected disabilities since the courts have rendered inconsistent holdings on this question.³⁶⁸ Finally, a requestor may ask the EEOC about what specific casual associations, such as friendships with disabled individuals, are protected under the ADA.

363. Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1175–76 (2021).

364. *Id.* (providing a detailed history of opinion letters and their benefits).

365. *Id.* at 1175.

366. See Erwin, *supra* note 220, at 3 (arguing that the number of disabled Iraq and Afghanistan service members indicates that employers will increasingly need to explore the interplay between these three statutes).

367. Cf. Letter from Cheryl M. Stanton, Adm’r, U.S. Dep’t of Lab. (Aug. 8, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_08_08_2A_FMLA.pdf (discussing a factually analogous situation wherein FMLA leave is permissible and appropriate when a parent must attend medical appointments and meetings related to the health of their child).

368. Compare *Cain v. Exxon Mobil Corp.*, 400 F. Supp. 3d 514, 523, 535–36 (M.D. La. 2019) (recognizing the viability of the plaintiff’s claim that his employer violated USERRA by discriminating against him when assuming he was “defective goods” because of his military service), with *Cazares v. City of El Centro*, No. 320-cv-01571-BEN-RBM, 2021 WL 807680, at *4, *10–14 (S.D. Cal. Mar. 3, 2021) (holding that USERRA does not recognize claims arising out of alleged discrimination or retaliation due to a plaintiff’s perceived or actual disability incurred during military service rather than arising out of the plaintiff’s actual status as a current or former member of the uniformed services).

D. State Action

Another course of action to consider is for individual states to pass their own additional and supplemental laws to provide further protection for family military caregivers. However, overall state solutions are less desirable than a federal solution given the fact that military caregivers may move to different bases across the country and around the world. Nonetheless, state action must be considered. In many cases, legislative action at the state level is an effective way to fill in perceived gaps in federal laws.³⁶⁹ This could be particularly meaningful regarding the lack of paid leave under the FMLA.³⁷⁰ According to the Elizabeth Dole Foundation's report, "[p]roviding employees with paid leave when caring for wounded, ill or injured family members may be the single most-important consideration an employer can make when thinking about expanding or implementing workplace support services that are friendly to military family caregivers."³⁷¹

State USERRA laws are another type of law for states to consider. States should consider amending these laws to include a disability association provision similar to the provision found in the ADA.³⁷² States should also consider prohibiting employment discrimination based on military status, including military spouses, as well as family and caregiving responsibilities to protect family military caregivers, especially those caring for veterans with disabilities. Like the federal USERRA, state USERRA amendments have received equal widespread bipartisan support. For example, in June 2021, the governor of Virginia signed a bill into law adding "military status" which includes a service member's spouse and children, as a protected trait under the Virginia Human Rights

369. See Wiggins, *supra* note 187, at 172.

370. See *supra* note 179 and accompanying text.

371. SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE, *supra* note 11, at 22.

372. See 42 U.S.C. § 12112(b)(4).

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Act.³⁷³ Notably, the legislature passed this bill unanimously; the bill passed the House of Delegates 99-0 and the State Senate 39-0.³⁷⁴

State agencies should be equally, if not more, diligent about issuing meaningful guidance to the public, especially as it relates to more protective state laws. State agencies could also issue opinion letters regarding military caregiver discrimination. For example, the Attorney Generals of Washington, Oklahoma, and South Carolina have issued opinion letters regarding their respective states' USERRA law applications.³⁷⁵ In July 2017, the attorney general of Virginia issued a "Military & Veteran Legal Resource Guide" for veterans and military families which explains the federal FMLA protections for military spouses and other family members among additional topics.³⁷⁶ State agencies should partner with veteran advocacy groups to ensure that these materials are distributed in a meaningful way.

373. VA. CODE ANN. § 2.2-3901(E) (2006); see 50 U.S.C. § 3911(4); see also Shaun Bennett & Kristina Vaquera, *Virginia Expands Housing, Employment Protections for Military Members*, JD SUPRA (Dec. 15, 2021), <https://www.jdsupra.com/legalnews/virginia-expands-housing-employment-1491065/>.

374. Mike Gooding, *New Law Protects Virginia's 115,000 Military Members from Discrimination*, 13NEWSNOW, <https://www.13newsnow.com/article/news/national/military-news/new-law-protects-virginia-military-members-from-discrimination/291-db5ee778-7535-496d-b087-cc2fd5961b2a> (July 1, 2021, 5:28 PM) (noting that the new law will protect Virginia's more than 115,000 active-duty military members and their families).

375. See, e.g., Op. Wash. Att'y Gen. No. 65 (1961), 1961 WL 62899, at *1 (answering whether "[a] state employee who takes a leave of absence because of being called to active duty in the military service [should] be entitled, on his return to state employment, to seniority credits for the time he has spent in the service"); Op. Okla. Att'y Gen. No. 2010-3 (2010), 2010 WL 1180223, at *3 (answering whether written notice of an employee's call to military service is required for reemployment); Op. S.C. Att'y Gen. No. 100 (1980), 1980 WL 81935, at *1 (responding to an inquiry of whether an officer is entitled to receive his full, normal civilian pay, without taking into account any military compensation that he may receive).

376. MARK R. HERRING, VA. OFF. OF THE ATT'Y GEN., *MILITARY & VETERAN LEGAL RESOURCE GUIDE 4* (2017), https://www.oag.state.va.us/files/Veterans_Legal_Resource_Guide_Final_PlusHeaders.pdf.

E. Private Sector Role

The pressing need to address the growing challenges of the military caregiver community should not be borne by government alone. In fact, many companies have been at the forefront of addressing the plight of military caregivers by spearheading innovative solutions to help address the problems facing these often-hidden heroes. For instance, Booz Allen Hamilton has developed an innovative “data-driven digital tool called the Caregiver Vulnerability Index [which] us[es] analytics and artificial intelligence to identify where caregivers live in the U.S. and help drive resources to the areas where they need the most help.”³⁷⁷ Booz Allen Hamilton has also created the Military Caregiver Fellowship Program which helps military caregivers build a professional network and gain job experience by pairing caregivers with a corporation in a fellowship.³⁷⁸ Other companies are contributing in unique ways. For instance, DoorDash created the Community Credits program that “offer[s] meal deliveries to any military or veteran families that are caring for a loved one that has been impacted by a service-related injury or illness.”³⁷⁹

Private organizations have also been critical in raising awareness to the issue. Notably, the Elizabeth Dole Foundation’s Hidden Heroes program aims to work with businesses and communities across the country to bring awareness to the issues that military caregivers face every day.³⁸⁰ One of the key objectives of the group is to establish a

377. *Shedding Light on Our Nation’s Military Caregivers*, BOOZ ALLEN HAMILTON, <https://www.boozallen.com/e/culture/shedding-light-on-our-nations-military-caregivers.html> (last visited Mar. 28, 2023).

378. *Id.*

379. See Jeanette Pavini, *New Program Offers Meal Deliveries for Military Caregivers Through DoorDash*, THE STREET (July 27, 2021, 8:00 AM), <https://www.thestreet.com/personal-finance/meal-deliveries-military-caregivers-doorDash>. “The program’s community credits will be made available to families that are experiencing financial stress, acute medical challenges, or other unexpected hardships that might make finding immediate access to an affordable meal particularly difficult.” *Id.*

380. See *Hidden Heroes: Campaign Overview*, ELIZABETH DOLE FOUND., <https://www.elizabethdolefoundation.org/hidden-heroes/> (last visited Mar. 31, 2023).

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national registry, that provides military caregivers with access to resources and support.³⁸¹ Overall, private sector initiatives can help alleviate the employment challenges that military caregivers face with more awareness, targeted programs, and greater resources.

CONCLUSION

Ultimately, military family caregivers can often obtain legal redress for caregiver discrimination if it is associational disability discrimination, is a violation of a leave law, or triggers military employment protections such as USERRA.³⁸² It is a national security imperative to address the employment law protections for military family caregivers because the current protections are woefully inadequate.³⁸³ At the end of the day, legislative or regulatory changes and additional guidance may help encourage service members to stay in the military and might motivate others to join.³⁸⁴

“For employers, investing in military caregiver employees can pay off with increased job satisfaction and loyalty—and greater retention and productivity.”³⁸⁵ Legislative changes at the federal, state, and local levels, along with robust support in the private sector, may help give these hidden heroes the recognition and appreciation they deserve as they continue to care for our service members and veterans.

381. *Id.*

382. *See supra* Part II.

383. *See supra* Part II.

384. *See supra* Part IV.

385. SUPPORTING MILITARY AND VETERAN CAREGIVERS IN THE WORKPLACE, *supra* note 11, at 32.